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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 356.

THE GREGORY CONSOLIDATED MINING COMPANY AND HENRY E. KAVANAUGH, PLAINTIFF IN ERROR,

vs.

LEWIS M. STARR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED APRIL 24, 1888.

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1 In the Supreme Court of the Territory of Montana.

LEWIS M. STARR, Plaintiff,
vs.
THE GREGORY CONSOLIDATED MINING COMPANY and HENRY E. KAVANAUGH, Defendants.

Statement on Appeal. Transcript on Appeal.

Statement.

Be it remembered that the defendant The Gregory Consolidated Mining Company herewith presents this its statement on appeal in the above-entitled action, and declares that the following were and are all the proceedings had in said action, to wit:

That on the 5th day of August, 1884, said plaintiff filed his complaint therein in the district court of the third judicial district, in the county of Jefferson, Territory of Montana; which said complaint was in words and figures as follows:

TERRITORY OF MONTANA, } ss:
County of Jefferson, }

In the District Court, 3rd Judicial District.

2 LEWIS M. STARR
vs.
THE GREGORY CONSOLIDATED MINING COMPANY and HENRY E. KAVANAUGH. } Complaint.

Now comes the plaintiff and for his cause of action against the above-named defendants avers—

1. That the above-named defendant, The Gregory Consolidated Mining Company, was at all times hereinafter mentioned and yet is a corporation created by and existing under the laws of the State of New York and doing business in the Territory of Montana.

2. That on the 28th day of July, A. D. 1883, one G. H. Malter and this plaintiff were copartners in business in the city and county of San Francisco, State of California, doing and transacting such business under the firm name and style of the Ætna Iron Works.

3. That on the said 28th day of July, A. D. 1883, this plaintiff, with his said copartner, entered into a contract with the said defendant, The Gregory Consolidated Mining Company, whereby it was agreed that this plaintiff and his said copartner should erect and equip a complete concentrating mill,
3 having the capacity of reducing seventy-five tons of ore *per diem*, for said The Gregory Consolidated Mining Company, said mill to be built at Gregory, in the county of Jefferson, Territory of Montana; and the said defendant covenanted and agreed to pay to this plaintiff and his said copartner the sum of twenty thousand dollars upon receipt at Helena, Montana, of a bill of lading

showing the shipment of the machinery from San Francisco, and the sum of thirty thousand dollars in three equal monthly instalments, due and payable respectively in thirty, sixty, and ninety days from the acceptance, upon completion, of said mill by said The Gregory Consolidated Mining Company; that in pursuance of said agreement plaintiff and his said copartner fully constructed and completed said mill in accordance with said contract, and the same was duly accepted by said defendant, The Gregory Consolidated Mining Company, on the 18th day of April, A. D. 1884.

4. That by the terms of said contract the sum of ten thousand dollars, for and on account of the building of said concentrating
4 mill and machinery furnished, became and was due on the 18th day of June, A. D. 1884, and the further sum of ten thousand dollars, by the terms of said contract, was due on the 18th day of July, A. D. 1884, but that said defendant has not paid the same or either of said sums or any part thereof, but the same are now wholly due and unpaid.

5. That before the commencement of this action and before the filing of the lien hereinafter named the copartnership between this plaintiff and the said G. H. Malter was dissolved, and said Malter, for value, sold, assigned, transferred, and set over unto plaintiff all of his right, title, and interest in and to the assets of said copartnership and in and to the said contract with said The Gregory Consolidated Mining Company aforesaid and the moneys due and to become due thereon.

6. That plaintiff, being desirous of availing himself of the benefits of chapter forty-one (41) of the Revised Statutes of the Territory of Montana and all acts of the Legislative Assembly of said Territory amendatory thereof, did, on the 17th day of July, A. D. 1884, and after the performance of said contract, and within ninety days after the completion thereof, file with the clerk of the county of
5 Jefferson, Territory of Montana, that being the county wherein said premises are situate, a notice of lien on the mill so erected by them, known as the Gregory concentrating mill, situated upon the mill site of said company, in section numbered four (4), of township numbered seven (7) north, of range number four (4) west, in said county of Jefferson, Territory of Montana, together with one acre of the ground whereon said mill is erected; which said notice of lien contains a just and true account of the balance as aforesaid due this plaintiff for the erection of said concentrating works, after deducting the sums paid thereon and the sums then in suit and all credits and offsets against the same, and containing a correct description of the property to be charged with said lien; which said notice of lien also certifies the above-named defendant, The Gregory Consolidated Mining Company, as being the owner of said premises, all of which will more fully appear, reference being had to the copy of said lien, hereunto attached, marked Exhibit "A," and made a part hereof.

6 7. That the above-named defendant, Henry E. Kavanaugh, has or claims to have some interest in said premises, but the same is subject and subordinate to the claim of plaintiff aforesaid.

Wherefore plaintiff prays judgment against said The Gregory Consolidated Mining Company for the sum of twenty thousand dollars, with interest on the sum of ten thousand dollars from the 18th day of June, A. D. 1884, and interest on the sum of ten thousand dollars from the 18th day of July, A. D. 1884, together with costs of suit.

Second. That said premises, building, and appurtenances above described, to the extent of the interest of said defendant, The Gregory Consolidated Mining Company, therein, be adjudged and decreed to be sold by the sheriff of said county of Jefferson according to law and the practice of this court, and that the proceeds of sale be applied to the payment of the costs of these proceedings and the satisfaction of plaintiff's claim for and on account of his said lien, and that said defendants and each of them be barred and foreclosed from having any right, title, or interest or equity of redemption in or to said premises or any part thereof.

7 Third. That plaintiff may have such other and further relief in the premises as may be in accordance with equity and as may appear to the court to be just.

SANDERS & CULLEN,
Att'ys for Pl'ff.

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

William E. Cullen, being first duly sworn, says: I am one of the attorneys for the plaintiff in the above-entitled action; that the reason why this verification is made by me and is not made by plaintiff in person is because said plaintiff is not now within the county of Lewis & Clarke, wherein his said attorney resides, and is therefore unable to verify the same; that I have read the foregoing complaint and know the contents thereof, and the facts therein stated are true to my best knowledge, information, and belief.

W. E. CULLEN.

Subscribed and sworn to before me this 4th day of August, A. D. 1884.

L. F. LACROIX,
Notary Public, M. T.

8 "EXHIBIT A."

The Gregory Consolidated Mining Co. to Lewis M. Starr, Dr.

To 1 concentrating mill, as per specification and contract	50,000 00
To 2 mining cars, @ $165.00 each	330 00
" four (4) roller shells furnished	470 00
	$50,800 00

1883. *Per Contra.*

By cash	$20,000 00	
" am't now in suit and for which an attachment has been levied	10,800 00	
		30,800 00
To balc. for which lien is claimed		$20,000 00

LEWIS M. STARR
vs.
THE GREGORY CONSOLIDATED MINING COMPANY.

Notice is hereby given that Lewis M. Starr, of the city and county of San Francisco, in the State of California, as the original contractor performed labor upon and furnished materials actually used
9 in the construction and erection of that certain concentrating mill known as the concentrating mill of the Gregory Consolidated Mining Company, situate upon the mill site of said company, in section numbered four (4), of township numbered seven (7) north, of range numbered four (4) west, in the county of Jefferson and Territory of Montana, and that said Lewis M. Starr also furnished certain of the machinery used in the construction of said mill; that at the time of the making of the contract for the erection and construction of said mill the above-named The Gregory Consolidated Mining Company was and yet is the owner and is the reputed owner of said premises and caused said concentrating mill building to be erected and the machinery and other material therefor to be furnished and the work and labor thereon to be performed; that the said Lewis M. Starr, together with one G. H. Malter, his copartner, doing business under the firm name of the "Ætna Iron Works," on the 28th day of July, A. D. 1883, entered into a contract in writing with the said The Gregory Consolidated Mining Company to
10 furnish the machinery for and erect said concentrating mill for said Gregory Consolidated Mining Company; that since the making of said contract the said G. H. Malter, for value, sold, assigned, transferred, and set over unto the said Lewis M. Starr all of his interests in the said copartnership and in the said contract, and he, the said Lewis M. Starr, is now the sole owner and holder thereof; that said contract has been fully performed and the said concentrating mill was fully completed and accepted on the 24th day of April, A. D. 1884, and ninety days have not elapsed since the furnishing of such machinery and materials and the performance of such work and labor; that the amount of the contract price for said material and machinery furnished and the erection and construction of said mill was the sum of fifty thousand dollars, and that said Lewis M. Starr, at the request of said Gregory C. M. Co., furnished certain extra machinery and appliances for said mill, amounting to the sum of eight hundred dollars; that the said The Gregory C. M. Co. has paid on account of said con-

tract the sum of twenty thousand dollars, and that said Lewis
11 M. Starr has levied an attachment on the property of said company for the sum of ten thousand eight hundred dollars, and there yet remains unpaid from said Gregory Consolidated Mining Company to the said Lewis M. Starr the sum of twenty thousand dollars, after deducting all offsets and credits and exclusive of the sum embraced in his said attachment; that it is the purpose of the said Lewis M. Starr to avail himself of the benefits of chapter forty-one of the Revised Statutes of the Territory of Montana and to claim a lien upon the said concentrating mill of said Gregory Consolidated Mining Company and upon the ground whereon the same is erected to the extent of one acre thereof, the same being as aforesaid in section numbered four, of township numbered seven (7) north, of range numbered four (4) west, for the balance so unpaid and unsecured, to wit, for the sum of twenty thousand dollars.

L. M. STARR.

STATE OF CALIFORNIA, }
County & City of San Francisco, } *ss:*

12 Lewis M. Starr, being first duly sworn, says that he is the lienor mentioned in the foregoing notice of lien; that he has read the same and knows the contents thereof, and that the same is true to his own knowledge; that there is justly owing to him from the said The Gregory Consolidated Mining Company the sum of twenty thousand dollars over and above all credits and offsets and exclusive of the amount secured by attachment.

L. M. STARR.

Subscribed and sworn to before me this sixteenth day of June, A. D. 1884.

[Seal of James L. King, Com'r of Deeds for M. T., San Francisco, Cal.]

JAMES L. KING,
Commissioner for Montana Territory in San Francisco, California.

MONTANA TERRITORY, }
County of Lewis & Clarke, } *ss:*

W. E. Cullen, being first duly sworn, says that he is a member of the firm of Sanders & Cullen, Helena, M. T.; that the within
13 lien has at all times been in the hands of said Sanders & Cullen for collection since the 16th day of June, 1884, and that no part of the same has been paid, but the whole amount thereof, to wit, the sum of twenty thousand dollars, yet remains due and unpaid.

W. E. CULLEN.

Subscribed and sworn to before me this 16th day of July, A. D. 1884.

L. F. LACROIX,
Notary Public, M. T.

TERRITORY OF MONTANA, } ss:
County of Jefferson, }

I, J. M. D. Taylor, county clerk and *ex officio* recorder in and for the county of Jefferson, in the Territory of Montana, do hereby certify that the above and foregoing is a full, true, and correct copy of a lien on file and of record in my office.

In witness whereof I hereunto set my hand and affix the seal of said county this 17th day of July, A. D. 1884.

J. M. D. TAYLOR,
County Clerk.

14 That thereafter, to wit, on the 13th day of January, 1885, the above-named defendant filed its answer to said complaint; which said answer was in words and figures as follows:

Title of Cause.

And now comes The Gregory Consolidated Mining Company, one of the defendants in the above-entitled cause, and for its separate answer to the plaintiff's complaint therein, *and* denies that on the 28th day of July, A. D. 1883, or at any other time, — entered into the contract set out in said complaint with said plaintiff and his copartner, and avers that on said day it entered into a contract with Ætna Iron Works, the terms of which are and were entirely different from the said contract pleaded and set out by plaintiff in his said complaint.

And said defendant says it has not information sufficient to form a belief as to whether or not said plaintiff and one G. H. Malter were at any time copartners comprising the firm or doing business under the name of the Ætna Iron Works, or that said Malter sold out his interest therein to said plaintiff, and
15 therefore denies the same; denies that said plaintiff or said plaintiff and his copartner or either of them ever completed or constructed said or any mill in accordance with the said or any contract made with this defendant, or that this defendant has at any time accepted said or any mill under said contract or any other contract; and the said defendant, for further defense to said alleged cause of action, avers that on said day said Ætna Iron Works and defendant entered into a certain contract, by which the said Ætna Iron Works agreed to construct said mill and have the same, with all the machinery, completed and delivered in perfect running order within four months from the date of said contract, upon certain other terms and conditions in said contract mentioned, and that said plaintiff nor said Ætna Iron Works nor did any one else for them or either of them complete or deliver said mill or was it in running order for delivery at said date, which was one of the terms and conditions attached to and included in the only contract entered into
16 between this defendant and any person or persons whomsoever in reference to the construction of said mill; by reason whereof the said plaintiff cannot and should not recover upon the contract declared upon and set out in his said complaint; and the said defendant further shows unto this hon. court that, according to

the terms and conditions of said contract, the said plaintiff and the said copartner, if said copartnership exists, as alleged in said complaint, obligated and bound themselves to have the said mill completed and in perfect running order by the 28th day of November, A. D. 1883, but that the said plaintiff neglected and failed so to do, and did not offer to deliver or tender the same until on or about the 10th day of February, A. D. 1884; that the reasonable value of the use of said mill to this defendant, as well as the reasonable use and value thereof for the purposes for which it was constructed, was one hundred dollars per day; that by reason thereof defendant has been damaged in the sum of $7,300.00; that said plaintiff
17 and his said copartner failed and neglected to complete the concentrator according to the terms of said contract and defendant will be compelled to and will have to lay out and expend in so completing the same about the sum of $1,500.00, which is the reasonable value therefor: that the said crushing machinery was not completed according to said contract; by reason whereof defendant was delayed and lost time in and about changing the same in the sum of $1,000.00, amounting in all to $9,800.00, which defendant asks may be adjudged a counter-claim to any judgment said plaintiff may recover in this action.

E. W. & J. K. TOOLE &
WM. WALLACE, JR.,
Def'is' Attorneys.

TERRITORY OF MONTANA,
County of Lewis & Clarke.

Harry W. Child makes oath and says that he is agent for said defendant answering herein, and that the matters therein stated are true to the best knowledge, information, and belief of affiant.

HARRY W. CHILD.

18 Subscribed and sworn to before me this 17th day of October, 1884.

VAL. LAUBENHEIMER,
Notary Public.

That thereafter and on the 9th day of April, 1885, said plaintiff filed his replication to said answer; which said replication was in words and figures as follows:

Title of Cause.

Now comes the plaintiff, and for reply to the new matter set up in defendant's answer herein—

1. Admits that by the terms of the contract the "Ætna Iron Works" agreed, conditionally, to have said mill completed within four months from and after the date of said contract, the condition in said contract expressed being that the lumber required to be used in constructing the building and placing the machinery therein should be delivered on the ground at Gregory, at the price of twenty-five dollars per one thousand feet within forty days after the receipt

of the bill of said lumber by H. W. Child, representing said
19 defendant, The Gregory Consolidated Mining Company; that such lumber was not delivered within said period of forty days, and the completion of said mill was thereby greatly hindered and delayed, but the same was thereafter completed within a reasonable time.

2. Denies that the reasonable value of the use of said mill to the defendant between the 28th day of November, A. D. 1883, and the 10th day of February, A. D. 1884, or between any other days or dates, was the sum of $100.00 per day or any other sum.

3. Denies that between the 28th day of November, 1883, and the 10th day of February, 1884, or between any other days or dates from the time of the execution of said contract up to the time of the delivery to and acceptance by said defendant of said mill, the reasonable value thereof was worth the sum of $100 per day or any other sum.

4. Denies that by reason of the non-completion of said mill within four months after the execution of said contract the said defendant, The Gregory Consolidated Mining Company was damaged in
20 the sum of $7,300 or any other sum whatever.

5. Denies that said plaintiff did not complete the concentrator according to the terms of said contract, or that anything was left incomplete about the same, but, on the contrary, avers that the said concentrator as constructed was thoroughly in compliance with the terms of said contract and a better mill than the contract called for.

6. Denies that said defendant The Gregory Consolidated Mining Company has expended or will be compelled to expend the sum of fifteen hundred dollars or any other sum in and about completing said mill.

7. Denies that the crushing machinery was not completed according to the contract.

8. Denies that said defendant The Gregory Consolidated Mining Company was delayed or lost any time in and about changing any crushing machinery required to be put in said mill by said contract.

9. Denies that said defendant was injured or damaged in the sum of one thousand dollars or any other sum whatever by reason
21 of having to change any crushing machinery put in said mill under said contract.

10. Denies that said defendant has been damaged in the sum of nine thousand and eight hundred dollars or any other sum or amount whatever by reason of any delay, default, or negligence of this plaintiff or his said firm whatever. Wherefore plaintiff prays judgment as in his complaint herein.

SANDERS, CULLEN & SANDERS,
Att'ys for Plaintiff.

MONTANA TERRITORY, } ss:
Lewis & Clarke County, }

W. E. Cullen, being first duly sworn, says: I am one of the attorneys for the plaintiff in the above-entitled action. The reason this verification is made by myself and is not made by said plaintiff in person is because he is not within the county of Lewis & Clarke, wherein his said attorneys reside, and is therefore unable to make the same. I have read the foregoing answer and know the contents thereof and the facts therein stated are true to my best knowledge,
22 information, and belief.

W. E. CULLEN.

Subscribed and sworn to before me this 31st day of March, A. D. 1885.

E. W. KNIGHT,
Notary Public.

That thereafter, to wit, on the 11th day of May, 1885, and under leave of court first had, said defendant filed its amendments to its said answer; which said amendments were in words and figures as follows:

Title of Cause.

And now comes the Gregory Consolidated Mining Company and for amendment to its answer, by leave of the court had, says that at the time of the purchase of the property in said complaint mentioned it was agreed and understood between the parties to said contract and Harry W. Child, agent in making said contract for this defendant, that they would deduct from the purchase price mentioned the sum of five thousand dollars in the event said Child, as such agent, would purchase said property of them, which was
23 to be received by said Child to his individual use; that said Child at once informed defendant thereof and assigned and turned over to this defendant his right and interest in said sum so promised, to be deducted from said purchase price mentioned in said contract, and that it is now the lawful owner thereef and is entitled to have the same set off or deducted from any amount found due said plaintiff on account of the sale and purchase of said property.

E. W. & J. K. TOOLE &
WM. WALLACE, JR.,
Att'ys for Defendant.

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

Harry W. Child makes oath and says that he is agent for defendant; that he has heard the foregoing answer read, knows the contents thereof, and that the matters therein stated are true to the best knowledge, information, and belief of affiant.

HARRY W. CHILD.

Subscribed and sworn to before me this 9th day of May, A. D. 1885.

WM. WALLACE, JR.,
Notary Public, Montana Ty.

24 That thereafter, on October 19th, 1885, the said plaintiff filed his replication to said amendments to said answer; which said replication was in words & figures as follows:

Title of Cause.

Now comes the plaintiff and, for replication to the amendment to the answer of the above-named defendant, The Gregory Consolidated Mining Company—

1. Denies that at the time of the purchase of the property in the complaint herein mentioned it was agreed or understood between the parties thereto that plaintiffs would deduct from the purchase price thereof the sum of five thousand dollars or any other sum in the event said H. W. Child would purchase said property of *them.*

2. Deny that said sum or any other sum was to be received by said Child to his individual use.

3. Denies that said defendant is entitled to have said sum or any other sum set off or deducted from any amount found due plaintiff on account of the sale and purchase of said property.

25 Wherefore plaintiff prays judgment as — his complaint herein.

SANDERS, CULLEN & SANDERS,
Att'ys for Plaintiff.

MONTANA TERRITORY, }
Jefferson County. }

W. E. Cullen, being first duly sworn, says he is one of the attorneys for the plaintiff; that the reason this verification is made by affiant and is not made by plaintiff in person is because the said plaintiff is not now within this county nor within the county of Lewis & Clarke, within which his attorneys reside, and is therefore unable to verify the same; that affiant has read the foregoing replication and knows the contents thereof, and the facts therein stated are true to the best knowledge, information, and belief of affiant.

W. E. CULLEN.

Subscribed & sworn to before me this 19th day of October, A. D. 1885.

B. H. TATEM, *Clerk.*
A. E. WELLS, *Dep-ty.*

26 That on the 7th day of May, 1885, said defendant filed its motion to suppress the deposition of one C. Hesse, a witness in behalf of said plaintiff; which said motion was in words and figures as follows:

Title of Cause.

Now comes the defendant The Gregory Consolidated Mining Company and moves the court to suppress the deposition of C. Heese, on file herein, for the following reasons, to wit:

1. No notice of the taking thereof was served on the defendants or either of them.

2. Said notice, as appears from the affidavit attached to said deposition, was served upon E. W. & J. K. Toole, which is no sufficient service.

3. Said notice does not give with sufficient certainty the time of the commencement of the taking of said deposition.

4. Because said notice required said deposition to be taken at the office of the clerk of the district court, and the certificate ap-
27 pended thereto shows that it was taken at the office of Charles S. Warren, a notary public.

5. Because the certificate does not show that the deposition was taken at the office of the district clerk, and because there is no such office in Butte City, M. T.

6. The affidavit shows that only a copy was served on said attorneys.

E. W. & J. K. TOOLE &
WM. WALLACE, JR.,
Attorneys for said Defendant.

That on the 10th day of May, 1885, said motion coming on to be heard, it was by the court heard and overruled; to which said ruling said defendant then and there excepted and which said exception was then and there noted and entered in the minutes of said court and said judge thereof.

That thereafter, on the 21st day of October, 1885, by order of said court, said action was duly transferred for trial to the district court of said district in and for the county of Lewis & Clarke, and that on the 23d day of December, 1885, said cause came on regu-
28 larly to be tried in the court aforesaid, and a jury having been regularly impaneled and sworn to try said cause, said plaintiff thereupon and in support of the issues resting upon him in said cause introduced the following testimony and no other, to wit:

HARRY W. CHILD, who, being first duly sworn, testified as follows, to wit:

I was the assistant general manager of the Gregory Consolidated Mining Company on the 28th day of July, 1883. I recognize this (here contract handed witness) as a contract made by me as assistant general manager of said defendant with the Ætna Iron Works and recognize my signature thereto. I have a duplicate or copy of said contract.

Thereupon said contract was offered and read in evidence by plaintiff; which said contract was in words and figures as follows:

Memorandum of an agreement made and entered into, at the city and county of San Francisco, State of California, this 28th day
29 of July, A. D. 1883, by and between the Ætna Iron Works, owned by Malter & Starr, the parties of the first part, and the Gregory Consolidated Mining Company, a corporation duly incorporated and existing under and by virtue of the laws of the State of New York, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the performance of the conditions hereinafter agreed to be performed by the said party of the second part, hereby agree to build and equip, as hereinafter set out, a complete concentrating mill, having the capacity of reducing seventy-five (75) tons of ore *per diem*, for said party of the second part, at Gregory, in the Territory of Montana, and to equip said mill with the following machinery, to wit: Two rock-breakers, 8 by 12; two sets of 26-in. rolls, and two sets of 20-in. rolls, with steel shells for each set; one elevator; one complete set of revolving sizing-screens; twelve jigs similar to those designed by Professor Hesse at the mine; all necessary shafting to drive the
30 above machinery. All necessary sizing-boxes, spitzkasten, sluice, and tracks, and generally everything necessary and requisite to complete and place in perfect running order, as designed by G. H. Malter, of said San Francisco, and accepted, with corrections by Professor Hesse. Reference is hereby had to said plans of said G. H. Malter, as corrected by Professor Hesse, and said corrected plans are made a part hereof. The machinery above enumerated is to be placed in perfect running order, in a first-class and workmanlike manner, in a suitable building of the description designed, and all foundations and banks upon which said building and machinery are to stand shall be provided with suitable retaining walls of stone where required. The engine & boiler and such material and machinery as are available from the old concentrator may be used by said party of the first part. The whole mill, with all machinery, shall be completed and delivered in perfect running order within four (4) months from date, provided the lumber re-
31 quired to be used in constructing the building and placing the machinery therein is delivered on the ground at Gregory aforesaid, at the price of twenty-five (25) dollars per thousand feet, within forty (40) days after the receipt of the bill for said lumber by H. W. Child, representing said party of the second part. Said party of the second part hereby guarantees that the cost of freight from the point of railroad nearest said Gregory to said Gregory shall not exceed one and one-half cents per pound, and if said freight shall exceed said price per pound said party hereby agrees to pay such excess to said party of the first part, and said party of the second part shall receive the benefit of any charge less than said price of one and one-half cents per pound. It is understood between the parties hereto, and the said party of the first part hereby guarantees, that said machinery when complete shall successfully reduce and concentrate, as agreed upon between Prof. Hesse and G. H. Malter, the amount of ore above named as coming from the mine

owned by said party of the second part and known as the Gregory mine.

32 And said party of the second part hereby agrees to pay said party of the first part for said work as follows, to wit: The sum of twenty thousand (20,000) dollars upon receipt, at Helena, Montana, of a bill of lading showing the shipment of said machinery from said San Francisco, and the sum of thirty thousand (30,000) dollars in three equal monthly instalments, to become due and payable respectively in thirty, sixty, and ninety days from the acceptance upon completion of said mill by said party of the second part.

In witness whereof said parties have hereunto set their hands and seals, at the city and county of San Francisco aforesaid, the day and year herein above first written.

(Signed) ÆTNA IRON WORKS,
Per G. H. MALTER.
GREGORY CONSOLIDATED MIN. CO.,
Per H. W. CHILD, *Assis't Gen. Man'g.*

That thereupon plaintiff offered in evidence the deposition of George H. Malter; which said deposition was in words and figures, as follows:

33 Title of Cause.

Be it remembered that, pursuant to the stipulation hereunto annexed, and on the 15th day of December, A. D. 1884, at my office, in the city and county of San Francisco, State of California, before me, a notary public in and for the said city and county of San Francisco, duly commissioned and appointed to administer oaths, etc., personally appeared GEO. H. MALTER, a witness produced on behalf of the plaintiff in the above-entitled action, now pending in said court, who, being by me first duly sworn, and then and there examined and interrogated by me upon the interrogatories hereto annexed, testified as follows:

Interrogatory 1. What is your name, age, occupation, and place of residence?

To the first interrogatory he saith: "G. H. Malter; 35 years; San Francisco; contractor."

Interrogatory 2. Are you acquainted with the parties to the above-entitled action? And, if so, you may state when you became acquainted with them and how long you have known them each respectively.

34 To the second interrogatory he saith: "Have known Starr since May, 1883; have known H. W. Child, the assistant manager of defendant, for these last two years, nearly; have known Jesse Lilienthal, the president of the Gregory Company, about one year."

Interrogatory 3. Were you ever connected in business with the above-named plaintiff; and, if so, when, between what dates, what was the firm name, and how was such connection terminated?

To the third interrogatory he saith: "Was connected in foundry business with Starr from June 12th, 1883, to March 5th, 1884, the firm name being 'The Ætna Iron Works.' We dissolved partnership, Starr taking the assets and agreeing to pay the debts, on said March 5, 1884."

Interrogatory 4. If in answer to the last interrogatory you say that you were connected in business with said plaintiff under the firm name of the Ætna Iron Works, you may state if you ever entered into any contract with said defendant for the erection
35 of a mill; and, if so, you may state when you made such contract and whether the same was or was not in writing.

To the fourth interrogatory he saith: "We entered into a contract with the Gregory Company, defendant, to build a mill. The contract was in writing."

Interrogatory 5. If you say that the said contract was in writing, you will attach the original contract or a copy thereof to your answer to this interrogatory as an exhibit.

To the fifth interrogatory he saith: "I produce copy of contract, which is hereto attached, marked Exhibit 1."

Interrogatory 6. You may state whether or no you ever delivered or caused to be delivered to said H. W. Child a bill of lumber required for the erection and completion of the concentrating works mentioned in said contract; and, if so, when you so delivered the said bill to said Child.

To the sixth interrogatory he saith: "I gave Child a bill of the lumber required, at my office, in San Francisco, a day or two after signing the contract."

36 Interrogatory 7. When was the lumber necessary for the erection and construction of said mill and called for in the bill you so delivered to said Child actually delivered upon the ground at Gregory, Montana, where said mill was being erected?

To the seventh interrogatory he saith: "The bills hereto attached, marked 'Exhibit 2,' are, I think, of the lumber contained in the list, and the dates on the margins are the dates of the delivery of the lumber."

Interrogatory 8. Have you any copy of the bill of lumber you delivered to said Childs or any memorandum thereof? If so, you may attach the same or a copy thereof as an exhibit to this answer.

To the eighth interrogatory he saith: "I have no copy of bill of lumber excepting the bills of delivery, which, I believe, contain the list of lumber ordered. The original bill was delivered to Child."

Interrogatory 9. When was said mill completed and what, if any, acceptance thereof was made by said defendant or any one
37 in its behalf.

To the ninth interrogatory he saith: "The mill was completed about the end of February, 1884, but it was not accepted until April 18, 1884, when it was accepted by Charles Hesse, the superintendent of the company in Montana."

Interrogatory 10. If you say in answer to the last interrogatory that one Professor C. Hesse, on behalf of said defendant, accepted said

concentrating mill, you may state when and how such acceptance was made, and if in a letter you will attach the same or a copy thereof in answer to this interrogatory.

To the tenth interrogatory he saith: "This specifying of objections was agreed upon. I then proceeded at once to do all that the objections set forth, although I knew that some things were not at all what was necessary or required by contract; as, for instance, the matter of screens, which had been made and furnished by the Ætna Company as per plans and specifications, but which the Professor Hesse wanted changed. While we were proceeding to change
38 the same the Professor Hesse said, 'Never mind; I don't care to have them changed. I will crush the ore coarser, and I will change the screens in a different way myself when I find out that it is better.' Hesse accepted the mill April 18, 1884, by letter hereto attached, marked 'Exhibit 3.'"

Interrogatory XI. Who, if any one, was the manager of said defendant company in the Territory of Montana at the time of the construction of said mill and its acceptance?

To the eleventh interrogatory he saith: "H. W. Child was the acting—the so-called assistant general manager."

Interrogatory 12. If, in reply to the last interrogatory, you say one H. W. Child was the assistant general manager of the said company and its representative in the Territory of Montana during the construction of said mill and at and after its acceptance, you may state whether you had any conversation with said Child with reference to the acceptance of said mill by said Hesse on behalf of the defendant, or generally concerning the completion of said
39 mill and its acceptance by the defendant; if so, you will state when you had such conversation, who was present thereat, and what was said.

To the twelfth interrogatory he saith: Answered under interrogatory ten.

Interrogatory 13. What objection, if any, did said Childs ever at any time make to you concerning the construction of said mill or its acceptance on the part of the defendant?

To the thirteenth interrogatory he saith: "Child said: 'I must please Hesse in the construction of that mill.'"

Interrogatory 14. What, if anything, did you do with your interest in said contract and the indebtedness created by reason of the construction of said mill, and who, if any one, is now the owner and holder of such indebtedness?

To the fourteenth interrogatory he saith: "I assigned all my interest to L. M. Starr. He is now the owner of the indebtedness."

Interrogatory 15. If you know any other matter or thing relative to the issues in this case and material to the plaintiff you may declare the same fully and at large as if thereunto particularly interrogated.

40 To the fifteenth interrogatory he saith: "Charles Hesse ran only one-half the mill and did not want to start the other half. After one-half the mill had been run for awhile day and night, it was run only during daytime, there not being sufficient ore

to keep it supplied. The half the mill running daytime only, or twelve hours, was equivalent to working the mill to one-fourth of its capacity. If the entire mill had been started at once and run day and night to its full capacity upon the few tons of ore which the company had on hand when the mill started, it would have been necessary to shut down the mill in a few weeks entirely—that is, as soon as the ore dump, which was very small, had been worked up. Therefore Hesse concluded to work only as much ore per day as the mine could supply per day, it being cheaper to keep the mill running than to keep starting and stopping it. The mill first started running about February, 1884, and the delay in the completion of the mill was caused in a great measure by the changes which
41 Hesse continued to order of us to be made in the construction and design of the mill. He changed the size of the rolls after we had partly made them at the foundry in this city. Thus he delayed the work here. He changed the construction of the building there and added slime concentrators and slime sizing apparatus which were not included in our original contract and for which the defendant paid us an extra amount of money and for which an extra amount of lumber was needed, a list of which is attached hereto, marked 'Exhibit 4.' This lumber was not delivered until the dates specified in the margins of the bills, 'Exhibit 4.' H. W. Child ordered us to make whatever changes or alterations or additions Charles Hesse required of us. If extra work was done by us at the request of Charles Hessee, Child said that the defendant Gregory Consolidated Mining Co. would pay us for such work in addition to the stipulated contract price. Both Child and Lilienthal told me that when the mill was acceptable to Hesse it would be acceptable to the company, defendant. I made a written agreement
42 with Lilienthal with regard to the changes required by Hesse previous to the accepting of the mill. I believe a letter-press copy of that agreement is in the hands of Sanders & Cullen, attorneys for plaintiff herein. The original of said agreement is in possession of defendant herein."

(Signed) G. H. MALTER.

EXHIBIT No. 1.

For copy of Exhibit No. 1, being memorandum of agreement between the Ætna Iron Works and the Gregory Consolidated Mining Company, see page 17, beginning at line 22, and ending on page 19, at line 29.

EXHIBIT No. 2.

Exhibit No. 2 being a bill of lumber bought of Jesse Patterson, Jefferson City, Montana, directed to the Gregory Mining Co., dated December 1st, 1883, with marginal dates for the several items contained therein, running from August 17 to October 8, 1883.

43 EXHIBIT No. 3.

GREGORY, *April* 18, 1884.

Mr. G. B. Malter, Ætna Iron Works, San Francisco.

D'R SIR: I take the liberty to inform you that the concentrator built here by the Ætna Iron Works is now completed and therefore it is not necessary for your agent, Mr. W. E. Wild, to remain here any longer. Same time I express you my entire satisfaction with the work done here. The new concentrator undoubtedly ranks among the best-arranged works of its kind. Although contract calls only for 80 tons of raw ore to be treated, I can easy double that amount and still make high-grade concentrates and clean waste, which is quite a success, taking into consideration that the ore here is very hard to treat. The building is substantially and well built; the machinery of first-class workmanship.

I remain yours respectfully,

C. HESSE,
Sup't Gregory Smelter.

44 EXHIBIT No. 4.

Exhibit No. 4 consists of a second statement for lumber, likewise dated December 1st, 1883, addressed to the Gregory Mining Company, bought of Jesse Patterson at Jefferson City, Montana, with marginal dates opposite the several different items thereof, running from and between October 19th, 1883, to December 19th, 1883, inclusive.

That said deposition was thereupon read in evidence, subject to the following objections to specific questions or answers therein as numbered, which said objections were then and there and prior to the reading of the several questions or answers by defendant duly interposed, passed upon by the court, and by it overruled, and exceptions to said several rulings duly then and there and at the time entered in the minutes of the judge of said court as follows, to wit:

1. To the reading of question and answer numbered "6" in said deposition, objected as being immaterial, in that the contract
45 did not provide for a delivery of said or any bill by Malter to said Child at any time; which said objection was by the court overruled, and defendant's exception to said ruling at the time entered in the minutes of the judge.

2. To the reading of answer numbered "7" in the said deposition defendant objected, for the reason that it is merely hearsay; that it is not responsive to the question, in that it does not refer to the lumber contained in the bill handed by him to Child; which said objection was by the court then and there overruled, and defendant's exception thereto entered in the minutes of the judge.

3. To the reading of answer numbered "8" in said deposition defendant objected, for that it is not responsive to the question, in that it refers to other bills of lumber than that inquired of;

which said objection was overruled and exception entered in the judge's minutes.

4. To reading of question numbered "9" in said deposition defendant objected because it does not refer to any person authorized to act in behalf of defendant in accepting and because no proof
46 of any agency has been theretofore introduced. Objection overruled and exception entered.

5. To the reading of answer to question numbered "9" in said deposition defendant also objected, for the reason that no authority had been heretofore shown in said Hesse to make an acceptance in behalf of this defendant, which said objection was by the court overruled; to which ruling defendant then and there excepted, which said exception was then and there noted down and entered in the minutes of the judge.

VI. To the reading of the letter of acceptance referred to in answer to interrogatory numbered "10" defendant objected, for the reason that no proof has been introduced of any authority of Hesse to act for or bind the company defendant in the acceptance of said mill, which said objection was by the court overruled; to which ruling defendant then and there excepted, which said exception was then and there noted down and entered in the minutes of the court.

7. To the reading of the 12th question and answer of said
47 deposition defendant objected, for that said question is premised upon an acceptance and none binding upon the company has been shown. Objection overruled and exception entered as aforesaid.

8. To the reading of answer to question numbered "15" of said deposition defendant objected severally as follows: To lines 1 to 5, because the same is hearsay; also because the same is a mere opinion and no showing that he is an expert upon that subject; to lines 5 to 14, because the same states a conclusion and opinion and no showing theretofore made that but half of said mill had — used; lines 8 to 14 objected to, because the same is a mere opinion and no showing that he was an expert; lines 15 to 24 of said answer objected to, because immaterial, in that contract provided for such changes, and therefore they constitute no excuse for delay, and, further, because same merely states an opinion as to the cause of delay; lines 30 to 33 of said answer objected to, because no authority has been shown in either Child or Lilienthal to accept or redele-
48 gate authority to accept said mill, and, further, because the same is immaterial in that it does not state that an acceptance by Hesse would constitute an acceptance by the company, but only that if it proved acceptable to Hesse, then the company would accept the mill. Each and all of which above-enumerated objections to answer numbered "15" were by the court then and there overruled, said rulings severally and at the time excepted to by defendant, and said exceptions at the time severally noted and entered in the minutes of the judge.

That thereupon plaintiff offered in evidence a certain letter; which said letter was in words and figures following, to wit:

"To the president and manager of the Gregory Consolidated Mining Company.

GENTLEMEN: Whereas Professor Hesse, your superintendent, has raised a number of objections to the acceptance of the concentrating mill constructed by the Ætna Iron Works for your company under a contract made July 28, 1883, I hereby agree to make the changes demanded by Prof. Hesse, as per a bill of objections submitted
49 to me, your company to pay the extra bill of the Ætna Iron Works for three (3) percussion tables and duplicates of machinery furnished; which bill, it is understood, does not exceed one thousand (1,000) dollars, and you agree to accept one of the two Blake crushers asked for by Prof. Hesse, after the next payment of ten thousand ($10,000) dollars due to the "Ætna Iron Works," as per contract with you, has been made by you.

(Signed) ÆTNA IRON WORKS,
By G. H. MALTER.

Accepted.

GREGORY CONSOLIDATED MINING CO.,
Per J. W. LILIENTHAL, *President.*

Which said letter was thereupon admitted and read in evidence by the court.

Whereupon plaintiff offered in evidence the said deposition of Charles Hesse hereinbefore referred to; which said deposition was in words and figures following, to wit:

Title of Cause.

Be it remembered that, pursuant to the order hereto attached and on the 29th day of November, A. D. 1884, at my office, in
50 the city of Butte, county of Silver Bow, and Territory of Montana, before me, Charles S. Warren, a notary public in and for the Territory of Montana, duly appointed and commissioned to administer oaths, personally appeared CHARLES HESSE, witness produced in behalf of the plaintiff in the above-entitled action, now pending in said court, who being by me first duly sworn, was then and there examined and interrogated by me in accordance with the annexed list of interrogatories, there being no counsel for either plaintiff or defendant present, when the following interrogatories were propounded and the following answers returned as follows, to wit:

Interrogatory 1. What is your name, age, occupation, and place of residence?

Answer. "Charles Hesse; 36 years; mining engineer; Gunderson P. O., Silver Bow county, Montana."

Interrogatory 2. Where were you and in what were you engaged from the first day of July, A. D. 1883, to the first day of May, A. D. 1884?

51 Answer. "I was in the service of the Gregory Consolidated Mining Company, having charge of their concentrating and smelting works at Gregory, Jefferson county, Montana Territory."

Interrogatory 3. Are you acquainted with a concern known as the Ætna Iron Works? If so, you may state what, if any, agreement was made between said Ætna Iron Works and the above-named defendant, The Gregory Consolidated Mining Company, concerning the erection of a concentrating mill at Gregory, Jefferson county, Montana, during the month of July, A. D. 1883. State all you know concerning the same.

Answer. "I am acquainted with G. H. Malter and E. B. Rogers, of the Ætna Iron Works of San Francisco. Mr. Harry W. Child informed me that he had made contract with the Ætna Iron Works for building a new concentrator of 75 tons capacity, and that I should make the general plans of it and send them to Mr. Malter, in San Francisco, immediately, which I did."

Interrogatory 4. Was the agreement for the completion of
52 such mill in writing? And, if so, you may state when, if at all, said Ætna Iron Works entered upon the work of constructing said mill, when it was completed, the general character of the mill, and what machinery was placed therein by plaintiff.

Answer. I don't know if the contract was in writing. I only saw a copy of it. I think the Ætna Iron Works commenced work on the new mill some time in August, 1883. As Harry Child and myself had decided to have the new mill built on the same place where the old one stood, Mr. Child had the millwright of the Ætna Iron Works, Mr. E. B. Wild, first remove the old mill from the ground, which took him some two weeks. I think the new mill was started up February 21, 1884, and had the following machinery in the building, viz: Two rock-breakers, 4 sets of crushing rolls (each of 26 in.), 2 elevators, one large car elevator, 2 sets of revolving sizing-screens, 12 jigs, 3 pointed boxes of iron, 2 Rittinger shaking tables of iron and covered with rub-er cloth and the necessary machinery to drive it.

53 Interrogatory 6. After the completion of said mill who, if any one, accepted the same on behalf of said company, and how was such acceptance made?

Answer. Some time after the mill was completed Mr. Malter asked me to make out a written acceptance of the mill and hand it over to Mr. Wild, which I did. Such acceptance bears the date of April 18th, 1884.

Interrogatory 7. Who, if any one, instructed you to accept said mill, or what authority did you have as superintendent to accept the same?

Answer. I did not think it necessary to obtain the authorization of anybody to furnish such a certificate of acceptance to Mr. Malter.

Interrogatory 8. Are you acquainted with one H. W. Child? And, if so, you may state what connection with said company or what official position he held therein from the 1st day of July, A. D. 1883, to the first day of May, A. D. 1884.

Answer. I am acquainted with H. W. Child. From July,
54 1883, to May, 1884, he held the position of assistant general manager of the Gregory Consolidated Mining Company.

Interrogatory 9. At on or about the day of your accepting said

mill did you have any conversation with said Child relative to your having accepted the same? If so, you may state what was said in such conversation and what objections, if any, he made concerning your acceptance of the mill.

Answer. Shortly after having given to Mr. Malter the above-mentioned acceptance I showed Mr. Child a copy of it, and, as he did not make objection to it, I considered it all right.

Interrogatory 10. Prior to your accepting said mill, what examination or trial had you made of the same, and what was the result thereof, as to the suitableness and efficiency and as to the construction and completion in accordance with the contract under which it was built?

Answer. I ran the mill for about a month or more and had the Ætna Works Co. make several changes in it, which they did;
55 for instance, I had them put in two new crushers of another pattern and various other small changes which I considered necessary to have the mill built according to contract.

Interrogatory 11. How long have you been engaged in business as a mining engineer, and from what school, if any, did you graduate or in what school did you study your profession?

Answer. I have been in the mining business since 1866, leaving the mining school of Freiberg, in Germany, as a graduate to the government service in the year 1870. Since that time I have been engaged in practical mining in different places of Europe and America.

Interrogatory 12. What, in your judgment as a mining engineer, is about the actual capacity of said concentrating works *per diem?*

Answer. When running in full I estimate the capacity of the new concentrator at Gregory to at least 120 tons per day. I estimate it to that amount for the reason I never got enough ore from the mine to run it to its full capacity.

56 (Signed) C. HESSE.

That said deposition was by the court admitted and by plaintiff read in evidence, subject, however, to the following objections to specific questions and answers therein as numbered; which said objections were each and all then and there and prior to the reading of the said several questions or answers by defendant duly interposed, by the court passed upon, and overruled; which said rulings were then and there and at the time duly excepted to severally by this defendant, and which said exceptions were duly then and there noted and entered in the minutes of the judge of said court as follows, to wit:

1. To question and answer numbered "6" defendant objected because no authority — shown in Hesse to accept said mill for defendant and no authority has been shown in Child to himself accept said mill or to redelegate the power to accept the same so as to bind the defendant; also to that portion containing statements of
57 H. W. Child, because the same is but the declaration of an agent and there is no showing of time or place where made, or that they were made while acting within the scope of his au-

thority; also because no authority — shown in Child to act, so that his silence would operate as an estoppel upon the company.

2. To answer to question numbered "12," in that the same is not responsive to said question, as merely an estimate is asked for, and because the reason assigned is no reason for an estimate, and for both reasons immaterial.

Whereupon the plaintiff rested his case, and the foregoing constitutes and was and is all the evidence introduced by him to support his said case, and no other or further evidence was introduced therefor.

Thereupon, and at the time plaintiff closed and rested his said case and stated that he had no further evidence to offer, this defendant made and filed its motion for a nonsuit; which said motion was in words and figures following:

58 *Motion for Nonsuit.*

Title of Cause.

Now comes the defendant The Gregory Consolidated Mining Company in the above-entitled cause and moves the court, the plaintiff having closed his evidence therein, that said plaintiff be nonsuited and his said action dismissed, for the reasons following:

1. That by said evidence plaintiff has failed to show or prove facts sufficient to constitute a cause of action against this defendant, in this, to wit: That by the terms of the contract proven it was provided that the sums sued for should be payable and due a certain period after the acceptance of said mill by this defendant, and that no acceptance of *of* said mill by defendant or any person legally authorized to accept the same for defendant was proven.

2. That by said evidence plaintiff failed to prove a cause of action against this defendant, in that said contract proven provided for a completion of said mill on or before four months after the date of said contract; that time was of the essence thereof, and that
59 the proof showed that said mill was not completed within the time specified and no legal excuse under the contract therefor shown.

3. For that plaintiff has failed to prove any cause of action against this defendant.

E. W. & J. K. TOOLE &
WM. WALLACE, JR.,
Att'ys for Def't Gregory Company.

Which said motion was thereupon and at the time argued by counsel and by the court heard and overruled; to which said ruling of the court this defendant then and there duly excepted, and which said exception was then and there duly noted and entered in the minutes of the judge of said court. Whereupon this defendant, to support its case, offered the following, among other, testimony, to wit: H. W. CHILD, who being sworn, was called as a witness, and among his evidence and testimony identified a certain bond and

certain letters as being the bond and letters severally hereinafter described and referred to; that thereupon said bond was offered in evidence; which bond was in words and figures following, to wit:

60 Know all men by these presents that we, Malter & Starr, as principal, and L. M. Starr, as surety, are held and firmly bound unto the Gregory Consolidated Mining Company, a corporation duly organized and existing under and by virtue of the laws of New York, in the penal sum of twenty thousand (20,000) dollars; for the payment of which sum we hereby bind ourselves, our heirs, administrators, successors, and assigns.

Signed and sealed at the city and county of San Francisco, State of California, this 28th day of July, A. D. 1883.

The condition of this obligation is such that whereas said Malter & Starr have this day executed a contract by the terms of which they agree to construct a concentrating mill for said Gregory Consolidated Mining Company, at Gregory, in Montana Territory; and whereas said Gregory Consolidated Mining Company are by the terms of said contract to pay said Malter & Starr the sum of twenty thousand (20,000) dollars upon receipt of a bill of lading showing that the machinery specified in said contract has been shipped from San Francisco:

61 Now, therefore, if said Malter & Starr shall well and truly perform all the conditions of said contract on their part to be performed, and shall repay said sum of twenty thousand dollars to said Gregory Consolidated Mining Company in case of non-performance, then this obligation shall be void; otherwise it shall remain in full force and effect.

(Signed) MALTER & STARR.
L. M. STARR.

And was thereupon admitted and read in evidence.

That H. W. Child further testified as follows:

"I do not know just when I received the statement of that lumber referred to in the contract; this defendant had nothing to do with this lumber business. I acted in that as the agent of the Ætna Iron Works, as they had no agent here to attend to it—that is, in purchasing the lumber or any supplies wanted. As near as I can remember, the first shipment of machinery for the mill was made by them in the last few days of October. The lumber was there on the ground and building constructed long before the machinery arrived.

62 The mill building for which the lumber was to be used and was used was completed, ready to receive the machinery, some time in the month of October, 1883, or before then, as near as I can recollect. We started the mill to running about the 20th of February, 1884. The mill would run two or three hours and then stop an equal length of time on account of breakages because of defective machinery."

Hereupon defendant asked of said witness Child, to wit: "I will ask you to state whether at the time of the completion of the mill building the machinery to be furnished under the contract was

ready to be put into it or had arrived either at Helena or at Gregory." Said question being objected to by plaintiff for the reason that there was no stipulation in the contract that it should arrive at any given time, said objection was by the court sustained; to which ruling of the court defendant then and there duly excepted, which said exception was at the time entered in the minutes of the judge.

Defendant further offered to prove what, at the time of the stoppages of the mill above referred to, was the actual daily expense and outlay of this defendant in its business, having previously
63 shown by said witness Child that defendant was engaged at the time in no other business than the reduction of ores and had no other mill or machinery for reducing the same, and that all its expenses were incurred in said business, and that the ores could only be reduced by passing through this concentrating mill, and that when said mill stopped no ores could be reduced; to which testimony so offered plaintiff objected, which said objection was by the court sustained and said testimony excluded; to which said ruling of the court defendant then and there excepted, which said exception was then and there noted and entered in the minutes of the judge.

That H. W. Child, on cross-examination, testified that at the time of the building of the mill in controversy he was the general manager in the Territory of Montana for the defendant company; that he was specially authorized to have said mill constructed by a letter from the president of the company; that the mill, from the time it started, had been run by the company off and on up to the present time; that Charles Hesse, whose deposition was read by the
64 plaintiff, was at the time of the building of said mill his, Child's, representative at the works.

Whereupon this defendant offered in evidence a certain letter, theretofore identified by witness Child as a letter written by him to the Ætna Iron Works while he was acting for them in the purchase of lumber and other supplies; which said letter was in words and figures as follows, to wit:

SEPT. 18, 1883.

Ætna Iron Works, San Francisco.]

GENTLEMEN: I must warn you that I have repeatedly wired you to commence your shipments to the mine. I have so wired you knowing the difficulties we shall have to contend with in getting the freight from the city to the mine. There are no available wagons here to transport freight and the prices will be enormous, and I cannot agree to deliver your freight. So, also, the Oregon steamers are heavily loaded, and it is hard work to get them to take
65 machinery. You must remember winter starts in early here and you have a big undertaking before you. Wild has the building up and wants any parts of the machinery you can ship, as he is ready for it and can put it in place. I can move small lots of machinery to the mine better than I can large lots. Why can you not ship the crushers, rolls, &c., immediately; also any other

parts you may have ready, and not hold everything until you have completed the order. Please ship and mark as follows (marking on the machinery the weights): "G. C. M. Co. ac. H. W. Child, Helena, M. T."

Yours very truly,

(Signed) H. W. CHILD, *Mandger.*

To the introduction of which plaintiff objected; which said objection was by the court sustained, and to which ruling of the court defendant then and there excepted; which said exception was at the time duly entered in the judge's minutes.

Whereupon defendant also offered in evidence four certain letters, each of which said letters had been theretofore identified by the witness Child as letters written by one Charles Hesse, being the same
66 person referred to in said contract, while said Hesse was watching the construction and completion of said mill under said contract; which said letters were in words and figures severally as follows, to wit:

GREGORY, *Feb.* 13, 1884.

Mr. H. W. Child.

D'R SIR: To-day the weather is not so cold and so I made a trial again to run the concentrator, but it did not work. The 2½-feet revolving screen below 11 rollers did not give the ore out—did not discharge at all—as it is made of wire screen, so I have sent Mr. Wild over to Wickes and got some perforated sheets, as we have not such number (5 min.) here. The sheets are here now and it will them take to-day and up to to-morrow noon to make the change, as the same time the spouting of said screen has to be changed. We are lowering the speed of all the revolving screens and making some change in the jiggs. To-morrow noon, I suppose, we can try it again. That means if we get the ice out of the jigger boxes
67 in the meanwhile. I wrote to Mr. Malter several times no wire screen shall be put on the revolving screens, but he did not pay any attention to these trivial things, as he calls it. I also wrote him to send 3 sheets of perforated screen more with ½ m. n., as ¾ m. n., most probably, will be too coarse, but he did not pay any attention to it. I am getting very much tired of the way this company has done business here. Pretty near everything has to be changed. Good is only what has been made here. Yesterday we had to drill a ½-inch hole into the one shell of first rollers and screw a steel block 1½ in. long in to close a cave in the shell. I wrote you yesterday that the rigid arrangement on rollers does not work, and we had to put the rubber puffer from the other side in. Agitator in settling tanks has been stopped, as it agitated too much fine galena into the creek. A manufacturing company which is making experiments on concentrating should have a sufficient supply of different kinds of perforated screens and wire screens, pulleys
68 of different sizes, etc., on hand for change. We have nothing of that kind here at all, and if it is not made exactly as the ore wants it—and that is only one way, which has to be found out

by experiments—concentrator will not work. That means we will not get a pound of ore out or through. Rollers do not crush satisfactory yet, although rubber puffers are screwed tight to their utmost capacity; will have to put washers between screws & puffer.

Yours resp'tf'y, C. HESSE.

GREGORY, *Feb.* 23, 1884.

Mr. H. W. Child.

DEAR SIR: I have made a report about the work done by Ætna Comp. on concentrator, but as Mr. Bach wrote me that you were coming out yesterday, not send it to you, I will keep report till you come out. Concentr. works very slow on acc. of the crusher, and the whole machinery is not very satisfactory, as you will see by report and yourself. The crusher No. 1 is broken; the big jaw, about 3″ thick, broke right into 2 parts last night. I took that jaw
69 out (the jaw, not the die) from the second crusher and put it into the one we are using now, but it does not fit very well, as the two crushers are not of the same pattern, and I am afraid it will break also. Very poor machinery delivered by the Ætna Works.

Yours resp'tf'y, C. HESSE.

GREGORY, *Feb.* 26, 1884.

Mr. H. W. Child, ass. man'g Gregory C. M. Co.

D'R SIR: Having run new concentrator for several days now, I formed myself an idea of the work done by it and report it to you. The general plant is well adapted to treat these ores here. The building is substantially and well built, but the machinery is not satisfactory, as you will see. The crusher, on account of its peculiar jaw movement, works but very slow, and even with one inch opening does not reach the capacity of an ordinary Blake crusher of the same size. The shoes and dies are fastened to the jaws by bolts going right through; the heads of these bolts wear out almost instantly and
70 cause the die to wear out, too. While with an ordinary Blake crusher it takes but one hour to put new shoes and dies in, it will take with this crusher from 8 to 10 hours; therefore will be a good deal of unnecessary expense to the comp. The jaw of crusher No. 1 broke right in 2 parts on acc. of bad castings. From the crusher the ore was to be sized by a shaking screen, but as it did not work at all we took it out. From there it goes to the 26″ coarse rollers. Also, these rollers work very slow on acc. of the peculiar way to drive them, as you will see with the other rollers; the one piece of rubber puffer is not strong enough for the rollers; our old rollers had 2 of such puffers. From these rolls the ore was sized by a shaking screen again. This we took out and replaced it by a revolving screen from the old concentrator; this revolving screen has but 2½ feet diam., which is too small. The fine stuff from there goes to the jigger revolving screens, the coarse is elevated by a bucket elevator to the second rollers; the elevator is good. The second

rollers are of the same size, 26″ diam.; had no rubber puffer,
71 but were rigid. This arrangement did not work at all, as the slightest bit of ore too much stopped the rollers altogether, so I took the rubber puffer from coarse rollers on the other side and put it onto these rolls. The rolls work now, but they do the same as the other rollers—do but very little work—so that the ore, most, is elevated again, passes through the rollers again, is elevated, and so on, and but very little ore is crushed fine enough for further treatment. The cause of this small work lies in two places: first, the rubber puffers are not strong enough, and, second, by the peculiar way to drive these rolls. You cannot screw them together so that they will do any work; they will simply stop, and do it even now often enough. The pull-y on main shaft for the one-half of these rolls is 18 inches, and this pull-y drives in a distance of 21 feet; a 6-feet pull-y where rolls *is* attached to by such a peculiar kind of engineering never will drive any rolls to crush quartz as we have here. What little ore finally is crushed fine enough to pass a 5 m. n. screen goes to the revolving (sizing) screen for jigs. These revolving screens have 3½ foot diam.
72 and if they were made better would do the work well, but there is no receiving cone on the upper end of the screens; therefore the ore drops mostly on the floor instead of into the screens. The substituted pieces of sheet iron placed in instead of the cone were no account and we had to take them out again. The jigs are good and will do their work well if the Ætna Comp. only would provide oil cups for the eccentrics. The finest ore goes to the settling tanks and is there separated into 3 different sizes, which go to 2 shaking tables. The settling tanks are made of iron and work well after we took the agitators out. The shaking tables are of a very poor make. There is no way to regulate them and we have to work them over entirely. The concentrates are hoisted to the roaster floor by a car elevator 60 feet high. This elevator is not to my satisfaction, as it runs very slow, is hard to stop on the right place, and has not even a safety spring on the cage.

I remark that the other half of the concentrator will require a good deal of work to be done more before it can be used, and
73 there are no settling tanks and tables here for the same.

Yours resp'tf'y,

(Signed) C. HESSE.

GREGORY, *Feb. 27th*, 1884.

Mr. H. W. Child.

D'R SIR: Concentrator is stopped; we putting in new shoes & dies in crusher. Please provide that the broken jaw is replaced. The one we have in the crusher now belongs to the other one, and as it does not fit this crusher (both crushers are not exactly alike—a very nice arrangement) the shoes and dies wear out like lightning. Also please order at once enough shoes and dies for crusher to keep us running. It takes 4 sets per month and per crusher. It took us hours to change shoes and dies. The rope on car elevator slipped last night. The cage went down and mashed the car all to pieces—

something what could not have happened if there was a safety spring on the cage.

The average stopping time now is about 6 hours in 24 hours for repairing, cleaning out blocked-up rollers, screens, and ele-
74 vator. How much time this will be after the machinery is worn somewhat I cannot tell, but I am afraid it will double. I have 2 carpenters at work to make an elevator for table concentrates and for repairs. I send you a sketch of the dimensions of the broken jaw. Can you not induce the Ætna Iron Works to take their 2 crushers out and send us instead of them 2 7 x 10 Blake crushers, old style, cast-iron frame? This would be a good deal cheaper for our company at the end than having all these expenses in steel jaws and the stopping of the mill.

Yours resp'tf'y,

(Signed) C. HESSE.

To the introduction of each of which said letters plaintiff then and there objected; which said objections were by the court sustained and said letters not admitted in evidence; to which ruling of the court this defendant then and there and at the time excepted, which said exceptions were likewise at the time duly noted and entered in the judge's minutes.

75 Whereupon plaintiff also introduced in evidence rebuttal on FREDERICK SCHENCK, who, being duly sworn, testified substantially as follows:

That at the time of building said concentrator he was in the employ of the defendant as foreman at the works and as watchman; that in December, 1883, and January, 1884, there was no ore on the dump of said Gregory mine; that at the time the mill started there was not more ore in the ore-house and dump of said Gregory mine than sufficient to run said mill for five (5) or six (6) days. After starting said concentrator all of the ore then out was run off through the mill in about that length of time, and that there was not sufficient ore being raised from the mine to keep the concentrator running. There were three bins full of waste or sorted ore, but none of any considerable value.

Whereupon, the evidence having been concluded and the cause argued by the respective counsel to the jury, the court instructed the jury as follows, to wit:

Plaintiff's Instructions.

I. If you believe from the evidence in this case that on or
76 about the 28th day of July, 1883, the defendant The Gregory Consolidated Mining Company entered into a contract with the Ætna Iron Works to construct a concentrating mill at its Gregory mine, in the county of Jefferson, Montana Territory, substantially as is alleged in the complaint, and if you also find from the evidence that the Ætna Iron Works constructed such concentrator as provided in said agreement, and that thereafter plaintiff became the owner

of the indebtedness resulting therefrom, then you should find for the plaintiff and assess his damage at the sum of twenty thousand dollars, with legal interest thereon from the date that the same became due under the contract, less any offset to said demand which the defendant The Gregory Mining Company may have proved to your satisfaction.

II. The contract calls for the completion of the concentrator in four months from the date of the contract, providing the lumber for the same was placed upon the ground where the concentrator was to be built within forty days from the date at which a bill for such lumber was placed in the hands of H. W. Child, assistant
77 general manager of the defendant The Gregory Consolidated Mining Company. This stipulation of the contract is therefore conditional only, and unless the lumber for the building was delivered on the ground within (40) forty days after the bill therefor was placed in said Child's hands, then there was no obligation on the part of plaintiff to complete said concentrating mill within four months from the date of the execution of the contract, but, as in other cases where the time is not limited, the law would impose an obligation upon them to complete it within a reasonable time.

3. If you believe from the evidence that the lumber necessary for the construction of said concentrating mill was not delivered upon the ground where said mill is built within forty days after the delivery of the bill therefor to said H. W. Child, then the defendant would not be entitled to recoup damages for the use of said mill after the expiration of four months from the date of the contract out of the sum due and owing for the construction of such mill, if,
78 considering the nature of the work, the season of the year, and all of the surrounding circumstances, the contractor, the said Ætna Iron Works, completed said concentrating mill within a reasonable time.

IV. If you should be of opinion from the evidence that the concentrating mill referred to in the pleadings and contract was not erected and completed within a reasonable time, due regard being had to all of the surrounding circumstances, then the defendant The Gregory Consolidated Mining Company would be entitled to recoup out of any sum you may find due the plaintiff on account of the construction of said mill the actual damage which it has sustained, if any, by reason of the failure of the said Ætna Iron Works to so complete the same within a reasonable time. If you should find said defendant entitled to any offset for damages, it is only entitled to actual damages or the actual loss it has sustained by reason of such failure to complete said concentrator within a reasonable time. You will therefore, in determining this question, first inquire what was a reasonable time in which the
79 said contractor, the Ætna Iron Works, should have completed said mill and put the same in running order, providing you find the lumber was not furnished in the time specified. You will then inquire what actual damage the defendant suffered after the expiration of such reasonable time and between that and the time when the mill was put in a condition to run and commenced

to run. If you find that the mill was erected for the purpose of concentrating ores from defendant's, Gregory, mine, then, in connection with the subject of damages to the defendant, you are authorized to inquire as to the condition of said mine—the amount of ore that defendant did or could have gotten out of said mine for working in said mill—and if you should find therefrom that defendant did not have actual use for said mill prior to the time it commenced to run, then defendant was not damaged by the failure on the part of the contractor to complete said mill even if the same was not completed within a reasonable time, and you ought not to find any damages on account thereof. The question of the completion of the
80 mill within a reasonable time does not enter into the case, unless you find from the evidence that there was a failure to furnish the lumber as provided in the contract.

V. A letter or certificate of acceptance, signed by one C. Hesse, has been introduced in evidence. If you believe from the testimony in this case that at the time of the making of this certificate that the said C. Hesse was an agent of the said defendant and authorized to make the same, and that in the making and delivery thereof the said Hesse was acting within the scope of his authority as such agent, then the making and delivery of said certificate was an admission on the part of the said defendant that the said concentrating mill was completed in accordance with the contract, and that the contractors, the Ætna Iron Works, were entitled to payment therefor in accordance with the terms of the contract under which it was erected.

General Instructions.

All provisions of a written contract must be found in the contract itself, and verbal understandings between the parties can
81 form a part of such contract. The defendant is not entitled to recoup any damage out of the contract price of said mill, which is not yet due. Under the contract sued on it was and is necessary for plaintiff to prove by a preponderance of evidence his entire fulfilment of the conditions of the contract or a waiver of the performance by the defendant. The mill and machinery having been placed upon realty, the mere taking possession of the property before or after completion would not operate nor would the continuous use of it operate as an acceptance under the contract, and an acceptance of the property you must find before any recovery can be had under this contract; but you may take into consideration the fact, if the evidence shows such fact, the commencement and continued working of the mill by the defendant in determining from the evidence whether or not there was an acceptance of the mill.

The jury are further instructed that any contract made by an agent whose interests are for any reason opposed to his principal is voidable at the election of the principal upon the dis-
82 covery of the fact; and if you find that the plaintiff or his copartner at any time agreed with the agent of the defendant that he was to receive from them a commission under the contract, and that afterwards this matter came to the knowledge of

the defendant, then the defendant was at liberty either to accept the contract and the benefits to accrue to the agent under it or to declare it void, and if they see fit to affirm it they are entitled to have the amount to be received by their agent credited to them upon the amount due on the contract; and if you find that it was to be deducted from the last-named payment under the contract, then you should credit it upon the amount sued for. The defendant here, as shown by the pleadings and proofs, is a foreign corporation having a managing agent in this Territory. Corporations can act only through their agents. All officers of a corporation, from president down, are in law but agents of the corporation. In considering whether the act of Hesse in accepting the concentrator was within the scope of his authority you are entitled to consider the
83 contract between the parties, the relation of Hesse in connection therewith, what was said and done with reference thereto, and the action of the company in running said mill; and if you find therefrom that Prof. Hesse had authority to make such acceptance, or that the same was subsequently ratified by the defendant The Gregory Consolidated Mining Company, then the defendant was bound thereby, and the consideration for the building of said mill, or, rather, the two payments here in suit, became due respectively in sixty and ninety days after the date of such payments, and you should find for plaintiff for the amount of such payments, together with interest thereon, at the rate of ten per cent. per annum, from the date that such payments respectively became due, less any amount you may find that defendant is entitled to recoup out of such amount as damages.

To the giving of plaintiff's instruction numbered "5" herein and before the giving of the same defendant then and there objected, because said instruction wrongfully stated the law, in
84 that an acceptance by this defendant under said contract would not of itself preclude a claim for damages on account of the non-performance or non-fulfillment of the terms of said contract, and also because there was no evidence tending to show any authority on the part of Hesse to accept for the defendant or to bind it by an acceptance, which said objection was by the court overruled; to which ruling the defendant then and there duly excepted.

Whereupon this defendant offered a certain instruction in words and figures as follows:

"The jury are instructed in the above-entitled action that time in the contract sued is of the essence thereof, and that if you find that the failure to fulfill the contract in time was without fault of the Gregory Consolidated Mining Company, then plaintiff cannot recover and you must find for defendant; which said instruction was by the court refused to be given; to which said refusal this defendant then and there duly excepted; which said exception
85 was then and there and at the time duly noted and entered in the minutes of the judge. Whereupon said jury, having been duly charged by the court, retired to consider their verdict, and having deliberated thereon, came into court and in open court

presented their verdict for plaintiff; which said verdict was in words and figures as follows, to wit:

Verdict.

Title of Cause.

"We, the jury in the above-entitled cause, find a verdict for the plaintiff and fix his damages at fifteen thousand ($15,000.00) dollars, with interest at the rate of ten per cent. on ten thousand dollars from July 18, 1884, to Dec'r 24, 1885; also interest on (5,000) five thousand dollars from Aug. 18, 1884, to Dec. 24, 1885, at the same rate of interest per annum.

(Signed) A. H. WEBSTER, *Foreman.*"

Whereupon and on the 24th day of December, 1885, and upon said verdict, judgment and decree was rendered in favor of said plaintiff and against said defendant in words and figures
86 as follows:

Title of Action.

This action came regularly on for trial. The said parties appeared by their attorneys. A jury of twelve persons are regularly impanelled and sworn to try said action. Witness- were sworn and examined, and, after hearing the evidence, the argument of counsel, and the instructions of the court, the jury retired to consider of their verdict and subsequently returned into court, and being called, answered to their names and say they find a verdict for the plaintiff and assess his damages at the sum of fifteen thousand dollars, with interest thereon at the rate of ten per cent. per annum on ten thousand dollars from the 18th day of July, 1884, to December 24, 1885, and interest on five thousand dollars from the 18th day of August, 1884, to December 24, 1885, at the same rate.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that the plaintiff have
87 and recover from said defendant the sum of seventeen thousand one hundred and eight dollars and eighty-one cents ($17,108.81), with interest thereon at the rate of ten per cent. per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of — dollars.

It is further ordered, adjudged, and decreed that if no sufficient property of the above-named debtor, the Gregory Consolidated Mining Company, can be found to satisfy the foregoing judgment and costs of suit, then the residue thereof shall be made and levied out of that certain concentrating mill known as the Gregory Consolidated Mining Company's concentrating mill, situate upon the mill site of said company, in section numbered four (4), of township numbered seven (7) north, of range numbered four (4) west, in the county of Jefferson and Territory of Montana, together with one (1) acre of ground whereon said mill is erected and situated, and that

said premises or so much thereof as may be sufficient to raise the amount due to the plaintiff for principal, interest, and costs,
88 and expense of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of the sheriff of the county of Jefferson, wherein said premises are situated; that said sheriff give public notice of the time and place for such sale, according to the course and practice of the court and the law relative to the sale of real estate under execution, and that the plaintiff or any of the parties to this suit may become purchasers at said sale, and that said sheriff, after the time allowed by law has expired, execute a deed to the purchaser or purchasers of the said premises on said sale; that said sheriff out of the proceeds of said sale retain his fees, disbursements, and commissions on said sale and pay to the plaintiff or his attorneys out of said proceeds the amount of the judgment herein, and the balance, if any, shall be paid to the said defendant; that the said defendant, the said Gregory Consolidated Mining Company, and all persons claiming from or under it and all persons having liens subsequent to the lien mentioned in
89 the complaint herein, their heirs or personal representatives, and all persons claiming under them be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said premises and every part and parcel thereof from and after the delivery of said sheriff's deed. It is further adjudged and decreed that the purchaser or purchasers of said above-described premises at such sheriff's sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises or any part thereof and any persons who since the commencement of this action have gone into possession under them or either of them deliver possession thereof to such purchaser or purchasers on production of the sheriff's deed for such premises or any part thereof, and that they have a writ of assistance to obtain the possession thereof in the event the same should be wrongfully withheld.

Done in open court and dated this 24th day of December, A. D. 1885.

(Signed) D. S. WADE, *Judge.*

90 And for assignment and specification of errors which this defendant intends to rely on on said appeal he presents as follows:

1. The court erred in overruling defendant's motion to suppress the deposition of Charles Hesse.

2. The court erred in overruling defendant's objections to those questions and answers in the deposition of George H. Malter numbered severally as follows, to wit: Question and answer numbered "6," answer number "7," answer number "8," question number 9, answer number 9, letter of acceptance mentioned in answer number "10," question and answer number 12, lines 1 to 5, 5 to 8, 8 to 14, 15 to 24, 30 to 33, of answer to question "15."

3. The court erred in overruling dafendant's objections to those

questions and answers in the deposition of Charles Hesse numbered severally as follows: Question and answer number "6," answer to question numbered "12."

4. The court erred in overruling defendant's motion for a nonsuit.

5. The court erred in sustaining plaintiff's objection to question set forth in lines 21 to 26 of page 37 of this statement.

91 6. The court erred in refusing to permit the defendant to prove the daily expense incurred by it while said mill stopped running.

7. The court erred in sustaining plaintiff's objection to the introduction of the letter from Child to Ætna Iron Works.

8. The court erred in sustaining plaintiff's objection to the introduction of the letters from Hesse to Child, numbered one to four.

9. The court erred in overruling defendant's objection to instruction numbered 5 of plaintiff's instructions and in giving the same to the jury.

10. The court erred in refusing to give defendant's instruction number one to the jury.

The foregoing 55 pages are hereby agreed upon as the statement upon appeal in the above-entitled action, and that the same may be used as such upon the appeal of said cause.

SANDERS, CULLEN & SANDERS,
Att'ys for Plaintiff.
E. W. & J. K. TOOLE AND WM. WALLACE, JR.,
Attorneys for Defendant.

92 And on the 7th day of January, 1886, the defendant The Gregory Consolidated Mining Company filed its notice of appeal in words and figures as follows, to wit:

Title of Cause.

To Messrs. Sanders, Cullen & Sanders, att'ys for the plaintiff, and B. H. Tatem, clerk of said court:

You will please take notice that the defendant, The Gregory Consolidated Mining Company, in the above-entitled action hereby appeals to the supreme court of Montana Territory from a judgment and decree therein made and entered in the district court aforesaid on the 24th day of December, 1885, in favor of said plaintiff and against said defendant last above named, and from the whole thereof.

E. W. & J. K. TOOLE & WM. WALLACE, JR.,
Att'ys for Defendant The Gregory Consolidated Mining Company.

Dated this — day of January, 1886.

Copy served this 7th day of January, 1886.

SANDERS, CULLEN, & SANDERS,
Att'ys for Plaintiff.

93 And thereafter and on the 7th day of January, 1886, the defendant The Gregory Consolidated Mining Company filed its undertaking upon appeal; which said undertaking was in words and figures as follows, to wit:

Title of Cause.

Whereas the defendant, The Gregory Consolidated Mining Company, in the above-entitled action is about to appeal to the supreme court of the Territory of Montana for a judgment and decree in said action made and entered in the district court of the 3rd judicial district of Montana Territory in and for the county of Lewis & Clarke, on the 24th day of December, 1885, in favor of said plaintiff and against said defendant last named, in the sum of $15,000.00, with interest on $10,000 thereof at 10 per cent. per annum from the — day of July, 1884, and on $5,000 thereof from the — day of August, 1884, and costs of suit:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents of the county and Territory last aforesaid, do hereby jointly and severally undertake and
94 promise in the sum of $300.00, three hundred dollars, to the effect that said appellant will pay all costs and damages which may be awarded against him on said appeal or on a dismissal thereof not exceeding said sum of three hundred dollars.

And whereas said decree so appealed from herein directs the sale of real property whereon exists a certain mechanic's lien, made the basis of the action aforesaid, and the payment of a judgment for any deficiency, if any there might be, after such sale; and whereas said appellant is desirous of staying the execution of said decree or judgment so appealed from and the whole thereof; and whereas it has been heretofore ordered by Honorable Decius S. Wade, judge of said district court, that a supersedeas and stay of execution upon said decree or judgment shall be had upon the filing of an undertaking in the sum of ($8,000.00) eight thousand dollars, conditioned as by law provided: Now, therefore, in consideration of such supersedeas and of the premises, we do further jointly and severally
95 undertake and promise and acknowledge ourselves jointly and severally bound in the further sum of ($8,000) eight thousand dollars, to the effect that during the possession of such property by the appellant it will not commit or suffer to be committed on said premises so decreed to be sold, and that if said judgment shall be affirmed or said appeal be dismissed he will pay any deficiency, if any there shall be, that may remain due and owing upon said decree after an application of the proceeds of the sale of said premises, not exceeding said sum of eight thousand dollars ($8,000.00).

Witness our hands and seals this 7th day of January, A. D. 1886.

(Signed) ALBERT J. SELIGMAN. [SEAL.]
EDMUND W. BACH. [SEAL.]

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

Albert J. Seligman and Edmund W. Bach, the sureties upon the foregoing undertakings, being severally duly sworn, each makes oath and says that he is worth the whole amount specified as
96 penalties in the foregoing undertakings over and above all his just debts and liabilities and exclusive of property exempt from execution.

(Signed) ALBERT J. SELIGMAN.
EDMUND W. BACH.

Subscribed and sworn to before me this 7th day of January, 1886.

[SEAL.] WM. WALLACE, JR.,
Notary Public.

The foregoing undertaking and the sureties thereon are hereby approved and a stay of proceedings ordered, and it is hereby ordered that all further proceedings under said judgment or decree so appealed from in said district court be stayed until the determination of said appeal, and that a supersedeas be had thereon.

Dated this — day of Jan'y, 1886.

D. S. WADE,
Judge of said Dist. Court.

97 TERRITORY OF MONTANA, }
County of Lewis & Clarke. }

I, B. H. Tatem, clerk of the third judicial district court of Montana Territory in and for Lewis & Clarke county, do hereby certify that the annexed and foregoing is a true & correct copy and transcript of the statement on appeal, answer, amendment to answer, bond of Ætna Iron Works, Child letter, complaint, contract, decree, defendant's offered instruction, deposition of Malter, deposition of Hesse, Hesse letters, instructions, Malter letter, motion for nonsuit, motion to suppress deposition, notice of appeal, order of transfer of cause, objections to depositions of Malter & Hesse, replication to amended answer, specifications of error, testimony of Child and Schenck, undertaking on appeal, and verdict in the above-entitled cause, wherein Lewis M. Starr is plaintiff and The Gregory Consolidated Mining Co. and Henry E. Cavanaugh are defendants, as appears by the records of this court.

Witness my hand and the seal of said court, affixed this 29th day of December, 1886.

[SEAL.] B. H. TATEM, *Clerk,*
By C. G. REYNOLDS, *Deputy Clerk.*

98 *Proceedings in the Supreme Court.*

In the Supreme Court of Montana Territory. January Term, 1887.

LEWIS M. STARR, Respondent,
vs.
THE GREGORY CONSOLIDATED MINING COMPANY *et al.*, Appellants.

Be it remembered that in the present term of January, A. D. 1887, the above-entitled cause was brought into the supreme court of Montana Territory by virtue of an appeal agreeably to law, and the transcript of the record therein of the court below was duly filed and the cause docketed and assigned for hearing at said term; and the said cause coming on to be heard before the court upon the said transcript of record, the same was argued by counsel. Thereupon, the cause coming on for the decision and judgment of the court on appeal, the court delivered its opinion and decision in writing, of which the following is a copy, viz:

99 *Opinion.*

In the Supreme Court of Montana Territory. January Term, 1887.

LEWIS M. STARR, Respondent,
vs.
THE GREGORY CONSOLIDATED MINING COMPANY *et al.*, Appellants.

Appeal from 3rd jud. dist., Lewis & Clarke county.

MCLEARY, *J.*, delivered the opinion:

This suit was brought by the respondent against the appellants to recover the balance of twenty thousand ($20,000.00) dollars alleged to be due on a contract for the erection of smelting works at the mines of the defendants company and to foreclose a builder's and mechanic's lien thereon filed to secure the same. The case was tried below before a jury, and, after a verdict and judgment in favor of the plaintiff for fifteen thousand ($15,000.00) dollars and interest, an appeal was duly taken therefrom to this court, alleging errors in the introduction and exclusion of evidence, in overruling
100 the motion for a nonsuit, and in giving and refusing instructions to the jury.

We will consider the specifications of error in a little different order from that pursued in the briefs of counsel or in the record of the case presented.

I. As to the overruling the motion for a nonsuit. This motion is based on the ground—

1st. That the sums of money sued for were, according to the contract, to be paid in sixty and ninety days after the acceptance of the mill by the defendant, and that no acceptance had been proven; and

2nd. That the contract provided that the mill was to have been

completed within four months from the date of the contract, and that time was of the essence of the contract, and that no legal excuse for the failure to complete the mill within the time specified was shown. The evidence in regard to the acceptance of the mill is clear and explicit enough if Hesse had any authority to make the acceptance. His letter of the 18th of April, 1884, is unequivocal and to the point. Nothing
101 could be more definite. His testimony is also to the same effect as is the deposition of Malter. Then this objection turns on the authority of Hesse to make the acceptance. His authority also appears from the evidence. It is shown that he was superintendent of the company's works; that he prepared the plans and specifications for the concentrating mill; that numerous changes in the machinery were ordered by him and were made to meet his views, and that the extra charges therefor were paid for by the company; that the president and the assistant general manager of the company had said to the agent of the Ætna Iron Works, the plaintiff's firm, that whenever the mill was acceptable to Hesse it would be acceptable to the company, and that Hesse, after writing the certificate of acceptance, had shown a letter-press copy of it to Child, the assistant general manager of the company, and he had raised no objection to it whatever.

All these facts taken together clearly show that authority of Hesse to accept the concentrating mill on behalf of the defendant company.

102 Corporations, in the nature of their constitution, must act through their officers and agents. There is no other mode possible in which they can act. The act of any officer is the act of the company, and even the acts of very many mere agents are considered the acts of the company. The authorities are numerous and uniform on this point.

Merchants' Bank *vs.* State Bank, 10 Wall., 644 *et seq.*
Woods Field on Corporations, secs. 220, 181, '2, '3.
Taylor's Law of Corporations, secs. 193–204.

The other ground relied upon for a nonsuit has no better foundation in fact. The language of the contract on this point reads: "The whole mill, with all machinery, shall be completed and delivered in perfect running order within four (4) months from date, provided the lumber required to be used in constructing the building and placing the machinery therein is delivered on the ground, at Gregory aforesaid, at the price of twenty-five (25) dollars per thousand feet, within forty (40) days after the receipt of the bill for said said lumber by H. W. Child, representing said party of the
103 second part." This, the only limitation of time made in the contract, was conditional on the delivery of the requisite lumber within forty days after the receipt of the bill. The evidence clearly shows that this condition was not complied with by the defendant company, and thereby the restriction as to time became inoperative and to complete the works within a reasonable time was all that was required of the plaintiff. This he did, as far

as the evidence shows, and no damage accrued to the defendant from any delay. Time was in no sense of the essence of the contract, and the defendant company, being itself in default, has no right to complain of any delay on the part of the plaintiff in this cause. The motion for nonsuit was very properly overruled.

II. But the admission of improper evidence is complained of by the appellants. So far as relates to the overruling of the motion to suppress the deposition of C. Hesse the bill of exceptions is based on
104 the notice given to take the deposition, and the notice nowhere appears in the transcript, so that this specification requires no further consideration. When a bill of exceptions is taken to any ruling of the court everything necessary to sustain the bill of exceptions must be contained in the transcript; otherwise the bill of exceptions is incomplete. The objections made to the testimony of the witness Malter are insufficient, many of them frivolous, and none of them well taken. As to the agency or authority of C. Hesse to accept the concentrator, it has been repeatedly held by this court that it is within the discretion of the trial court to direct the order of proof. It was not necessary that the authority of Hesse should be shown before the letter or certificate of acceptance signed by him was introduced in evidence. If this was done afterwards the appellant has no reason to complain. That it was so done amply appears from the testimony. The objections made to the testimony
105 of the witness Hesse are, in part, not borne out by the record and are not in any case well founded.

III. The question asked by the appellant of the witness Child was properly excluded by the court for the reasons stated in the record. It was not a matter material to this case as to what time the machinery arrived at Helena or Gregory. No stipulation in regard thereto is contained in the contract, and no time for the completion of the mill itself was agreed upon except in the event that the lumber should be delivered at a certain time by the defendant, which was not done, as has been already stated herein.

Appellant further insists that the court erred in refusing to permit it to prove the daily expense incurred by it while said mill stopped running. This position seems to be based on the claim that the works were not completed within four months from the date of the contract, which, we have already shown, the plaintiff was
106 not bound to do, because the lumber was not delivered within the forty days specified. There was no evidence introduced to show that the concentrator was not completed within a reasonable time, and, the plaintiff not having been shown to have been in default, there was no predicate to it for proof of any damages on the part of the defendant company. This was presumably the reason for the exclusion of the evidence by the trial court, though the record is silent as to that. Nor does the exception state the reasons alleged by the appellant for its exception, and the same might well be disregarded by this court on that account, but we have seen fit to notice it to this extent. The court at the trial correctly excluded the letter written by Child to the plaintiff and the letters written by Hesse to Child. It is an elementary principle that neither party

can thus make evidence for himself. Though the plaintiff
107 might, if he had seen fit, have introduced these letters, they are not admissible on the part of the defendant. It nowhere appears in the transcript that the letters of Hesse were offered for the purpose of contradicting him as a witness, and the point cannot for that reason be raised in the brief alone; neither is there any evidence whatever that Hesse was the agent of both parties in any particular, nor in any sense the agent of the plaintiff. The bill of exceptions do- not present these alleged errors in a manner sufficiently explicit to demand the attention of the appellate court, but we have given the appellant the benefit of the same, notwithstanding these defects.

IV. The appellant complains that the court erred in giving to the jury the instruction marked "5," which reads as follows:

"V. A certificate or letter of acceptance signed by one C. Hesse has been introduced in evidence. If you believe from the testimony in this case that at the time of the making of this certificate
108 the said C. Hesse was an agent of the said defendant and authorized to make the same, and that in the making and delivery thereof the said Hesse was acting within the scope of his authority as such agent, then the making and delivery of said certificate was an admission on the part of the said defendant that the said concentrating mill was completed in accordance with the contract, and that the contractors, the Ætna Iron Works, were entitled to payment therefor in accordance with the terms of the contract under which it was erected;" to which defendant objected because said instruction wrongfully stated the law, in that an acceptance by this defendant under said contract would not of itself preclude a claim for damages on account of the non-performance or non-fulfillment of the terms of said contract, and also because there was no evidence tending to show any authority on the part of
109 Hesse to accept for the defendant or to bind it by an acceptance.

This instruction correctly states the law. It does not instruct the jury that the acceptance precluded a claim for damages on the part of the defendant. No such claim was proven nor was there any predicate laid for any such proof, as we have heretofore seen. We have also seen that the proof of Hesse's authority to accept the works was amply sufficient, and that question is fairly submitted to the jury in the very instruction excepted to, and we can see no reason for the appellant to complain. There was no error in giving this instruction to the jury.

V. The appellant also alleges as error the refusal of the trial court to give to the jury the following instruction, to wit: "The jury are instructed in the above-entitled action that time in the contract sued on is of the essence thereof, and that if you find that the failure to fulfill the contract in time was without fault of the Gregory Consolidated Mining Company, then plaintiff cannot recover and you must find for the defendant."

110 The bill of exception assigns no reason therefor, and thus, as is the case with several others above mentioned, is not en-

titled to consideration here. But we will say that this instruction would have been misleading had it been given to the jury, and it would have had no evidence to support it. Time was not of the essence of the contract sued upon. There was no proof to show that the concentrating mill was not completed within the time required by the contract—that is to say, within a reasonable time—and even had there been it would not have warranted the jury in finding against the plaintiff altogether, but only in deducting from his claim such damages as the defendant might have suffered thereby, and none were shown by the proof. So had this alleged error been properly specified by the appellant, or properly set forth in the bill of exceptions, it could not have availed the appellant.

We have searched this record in vain for any error of the court sufficient to cause a reversal of this cause. We can see no reason why the payment of plaintiff's demand should have been re-
111 fused. According to the evidence adduced herein and the law as we understand it, the judgment is correct, and it is accordingly affirmed with costs."

Filed January 28th, 1887.

I. R. ALDEN, *Clerk.*

Thereupon judgment on appeal was entered in said cause in the words and figures following, to wit:

In the Supreme Court of Montana Territory. January Term, 1887.

LEWIS M. STARR, Respondent,
vs.
THE GREGORY CONSOLIDATED MINING COMPANY *et al.*, Appellants.

Judgment on Appeal.

Be it remembered that in the present term of January, A. D. 1887, the above-entitled action was brought into the supreme court of the Territory of Montana by virtue of an appeal agreeably and in conformity with the statute of said Territory and the rules of
112 this court in such case made and provided, and the transcript of the record of the court below filed and the cause docketed and assigned for hearing by said court at the said term thereof.

And the said cause, coming regularly on to be heard before the court on the said transcript of record, was argued by counsel.

Whereupon it is now here ordered and adjudged by this court that the judgment and decree of the court below entered in said cause on the 24th day of December, A. D. 1885, be, and the same is hereby, affirmed, with costs.

And it is hereby further ordered and decreed by this court that the said plaintiff and respondent, Lewis M. Starr, recover against the said defendant and appellant, The Gregory Consolidated Mining Company *et al.*, — dollars for his costs herein expended and have execution therefor.

28th January, A. D. 1887.

And on the 18th day of March, 1887, appellants filed bond on appeal to Supreme Court of the United States, to wit:

113 In the Supreme Court of Montana Territory.

Know all men by these presents that we, Albert J. Seligman and John C. Curtin, of Lewis and Clarke county, Montana Territory, are held and firmly bound unto Lewis M. Starr in the full and just sum of twenty-five thousand dollars, lawful money of the United States of America, to be paid to the said Lewis M. Starr, his executors, administrators, or assigns; to which payment, well and truly to be made, we hereby bind ourselves, our heirs, and each of our heirs, executors, administrators, and assigns, jointly and severally, firmly by these preents.

Sealed with our seals. Dated this 17th day of March, A. D. 1887.

Whereas lately, at a term of the supreme court for the Territory of Montana, in a suit pending in said court between Lewis M. Starr, as plaintiff and respondent, and The Gregory Consolidated Mining Company and Henry E. Kavanaugh, as defendants and appellants, there was rendered a final judgment and decree in favor of the said plaintiff and respondent and against the said defendants and
114 appellants for the sum of fifteen thousand dollars, exclusive of interest and costs of suit; and the said defendants having sued out a writ of error from the Supreme Court of the United States, directed to the said supreme court of Montana Territory, and lodged a copy thereof in the clerk's office of said last-named court for inspection by said plaintiff, to remove said cause to the Supreme Court of the United States to reverse said final judgment and decree in said cause, and a citation directed to the said plaintiff, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next:

Now, the condition of this obligation is such that if the said defendants shall prosecute their said writ of error to effect and answer all damages and costs and pay all damages and costs that may be awarded against them by reason of the suing out of said writ of error if they shall fail to make good their plea, then this obligation to be void; else to remain in full force and virtue.

ALBERT J. SELIGMAN. [SEAL.]
JOHN C. CURTIN. [SEAL.]

115 Sealed and delivered in the presence of—
C. P. CONOLLY.

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

Albert J. Seligman and John C. Curtin, being duly sworn, each for himself says that he is one of the sureties in the foregoing undertaking and is worth the amount therein named as the penalty over

and above all his just debts and liabilities, exclusive of property exempt by law from execution. ALBERT J. SELIGMAN.
JOHN C. CURTIN.

Subscribed & sworn to before me this 17th day of March, A. D. 1887.

[SEAL.] C. P. CONNOLLY,
Notary Public.

Endorsed: "The form and penalty and sufficiency of the sureties of the within bond and are hereby approved and supersedeas ordered. Decius S. Wade, chief justice. Filed March 18, 1887. I. R. Alden, clerk."

116 *Writ of Error.*

In the Supreme Court of the United States.

THE GREGORY CONSOLIDATED MINING COMPANY and HENRY E. KAVANAUGH, Plaintiffs in Error,
vs.
LEWIS M. STARR, Defendant in Error.

The President of the United States of America to the honorable the justices of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, in a cause between The Gregory Consolidated Mining Company and Henry E. Kavanaugh, plaintiff- in error, and Lewis M. Starr, defendant in error, a manifest error hath happened, to the great damage of the said Gregory Consolidated Mining Company and Henry E. Kavanaugh, plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning
116*a* the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this third day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

[Seal Supreme Court Montana Territory.]

ISAAC R. ALDEN,
Clerk of the Supreme Court of Montana Territory.

Allowed.
DECIUS S. WADE,
Chief Justice.

[Endorsed:] No. 2. In Supreme Court of the United States. Gregory Consolidated Mining Company and Henry E. Kavanaugh, pl'ffs in error, *vs.* Lewis M. Starr, def't in error. Writ of error. Filed March 3, 1887. I. R. Alden, clerk.

117 *Citation.*

In the Supreme Court of the United States.

THE GREGORY CONSOLIDATED MINING COMPANY and HENRY E. KAVANAUGH, Plaintiffs in Error,
vs.
LEWIS M. STARR, Defendant in Error.

[Seal Supreme Court, Montana Territory.]

To Lewis M. Starr, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Montana Territory, wherein The Gregory Consolidated Mining Company and Henry E. Kavanaugh are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness Honorable Decius S. Wade, chief justice of the supreme court of Montana Territory, this third day of March, A. D. 1887.

DECIUS S. WADE,
Chief Justice.

Service of a certified copy of the foregoing citation accepted the 14th day of March, 1887.

SANDERS, CULLEN & SANDERS,
Att'ys for Respondent.

[Endorsed:] No. 2. Original. In Supreme Court of the United States. Gregory Consolidated Mining Company and Henry E. Kavanaugh, pl'ffs in error, *vs.* Lewis M. Starr, def't in error. Citation. Filed March 18, 1887. I. R. Alden, clerk.

118 In the Supreme Court of Montana Territory.

GREGORY CONSOLIDATED MINING COMPANY and HENRY E. KAVANAUGH, Pl'ffs in Error,
vs.
LEWIS M. STARR, Def't in Error.

I, Isaac R. Alden, clerk of the supreme court of Montana Territory, do hereby certify the foregoing one hundred and seventeen pages, numbered from 1 to 117, inclusive, contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made,

and had in said court in said cause as the same appear on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 16th day of June, A. D. 1887.

Seal Supreme Court, Montana Territory.

ISAAC R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory supreme court. No. 356. The Gregory Consolidated Mining Company and Henry E. Kavanaugh, pl'ffs in error, *vs.* Lewis M. Starr. Filed April 24, 1888.

Office Supreme Court U. S.
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JAMES H. McKENNEY
Clerk

No 513

~~MONTANA TERRITORY.~~

U.S.

Supreme Court.

~~JANUARY TERM 1887.~~

LEWIS M. STARR,
Respondent.

vs.

THE GREGORY CONSOLIDATED MINING CO. AND HENRY E. KAVENAUGH,
Appellants.

Points and Authorities of Appellant.

TOOLE & WALLACE,
Attorneys for Appellant, Gregory Con. M'ng. Co.

HELENA, M. T.:
INDEPENDENT PUBLISHING CO.
1887.

MONTANA TERRITORY.

IN SUPREME COURT.

JANUARY TERM, 1887.

LEWIS M. STARR,
Respondent.
vs.
THE GREGORY CONSOLIDATED MINING CO. AND HENRY E. KAVENAUGH.
Appellants.

Points and Authorities of Appellant.

I.

This appeal is from a judgment rendered in an action brought by respondent against appellant, and one Henry E. Kavenaugh to recover the sum of $10,000 alleged to be due

on account of the construction of a certain mill and concentrating works under and in compliance with a certain contract alleging an *acceptance* thereof under the contract. Appellants' answer denies the *acceptance* and also denies the contract. The errors complained of occurred during the progress of the trial are found on pp. 42 and 43 of the transcript, and will be considered in their order.

~~II~~ I

first 42

The ~~second~~ specification of error found on page ~~54~~ consists of alleged error of the Court in overruling objections made by appellant to certain questions and answers in the deposition of G. B. Malter: which objections and exceptions are found specifically and properly enumerated on pages 17, 18 and 19 of transcript, and of which the first three, viz.: Objections to questions and answers Nos. 6, 7 and 8, involqe the question as to whether or not the contract provided for the delivery of a bill of lumber by Malter to H. W. Child; and further, that even if this were the case, the reference to lumber mrde in the answers to questions 7 and 8 refers to other lumber than that contained in the bill, and is not responsive to the questions themselves. An examination of the coutract discloses the fact that the mill was to be completed and delivered in perfect running order within four months of its date, provided that the lumber required to be used should be delivered upon the ground within 40 days after the receipt of the bill for said lumber by H. W. Child, representing the party of the second part. The ob-

jections to questions and answers Nos. 9, 10 and 12, respectively, present a material proposition relied upon by the appellants to reverse the judgment of the Court below. It is manifest from the objections and from the questions and answers that the act or declaration of one Charles Hesse in accepting or purporting to accept the mill and machinery under the contract, was admitted in evidence BEFORE any proof of his agency had been introduced, and *before* any proof of authority to act in behalf of appellant, in accepting the same under the contract. It appears from the contract itself that indebtedness under it could only be created, or a right to action arise within a certain number of days after the acceptance of the concentrating works and machinery in accordance with its terms. The only acceptance proven, or sought to be proven, was one purporting to be made by the above named Charles Hesse, and this proof of acceptance was introduced under objection by appellant prior to any authority having been shown in Hesse so to act for it. The question primarily arises, therefore, whether under any circumstances the act or declaration of an agent is admissible against his alleged principal until the agency has been established and proven. Under the Common Law practice this question was an open one and the decisions of the different States were divided upon it. The following authorities sustain the position that even at common law the agency must be established before the act or admission of the alleged agent can be given in evidence against the principal, and that the proof must be further and other than that of the mere declamation of the agent himself.

Francis vs. Edwards, 76 North Carolina 271.
Breckenridge vs. McAfee, 54 Indiana 141.
Streeter vs. Poor, 4, Kansas 412.
Mapp vs. Phillips, 32 Georgia 72.

Brigham vs. Peters, 1 Gray, 139.
Fairlis vs. Hastings, 10 Vesey 126.
Campbell vs. Hastings, 29 Arkansas 512.
Peck vs Ritchie, 66 Missuri 114.
Coon vs. Gurley, 49 Indiana 199.
Reynolds vs. Ferree, 86 Ill. 570.
Barrow vs. Brown, 28 La. Ann. 459.
Moore vs. Ritter, 11 Humpreys 67.
1st Green on Ev., § 113.
Story on Agency, §134.

We apprehend, however, that whatever may have been the conflict upon this question at common law, the matter has been finally put at rest by our code, and that under our practice it is manifestly error to admit the act or declamation of an agent until his agency shall have been first established by sufficient evidence. Our code, sec. 624, subdivision 5th, page 156, provides, "AFTER proof of a partnership or agency, the act or declaration of a partner or agent of the party within the scope of the partnership or agency and during its existence." Here, therefore, we conceive the Court committed a manifest error, and it is a familiar principle that where error is committed injury is presumed: and it must clearly appear, to avoid the error, that no injury accrued.

Jackson vs. F. R. Water Co., 14 Cal. 18.
Norwood vs. Kenfield, 30 Cal. 393.

It is manifest, however, that this was a material error, and that appellants were injured thereby, as no other proof of the authority of Hesse to accept the mill under the contract so as to bind the Company, was subsequently introduced. And this acceptance by the Company was material to the right of action and recovery, as appears from the contract and the instructions of the court. The contract

was entered into by H. W. Child: the alterations were accepted by Jesse Lilienthal, the President of the Company (see record, p. 20) and all further evidence in the cause discloses a want of authority rather than possession of authority by Hesse to accept that or any mill on behalf of the Company. The only pretense of any testimony as to the authority of Hesse is found upon page 15 of the transcript, lines 14 to 17, and consists simply of declarations by Child and Lilienthal, themselves the agents of appellant, and without any authority so far as appears from the evidence to redelegate their authority to any other person, that when the mill was acceptable to Hesse *it would be* acceptable to the Company defendant; and this, given its ordinary interpretation, would simply indicate that when Hesse was satisfied as superintendent with the mill as constructed, the Company would accept it in accordance with the terms of the contract; and the subsequent alteration was accepted by Lilienthal, the Company's President.

III.

The ~~third~~ second specification of error comprises objections to questions and answers Nos. 6 and 12 of the deposition of Charles Hesse. The objections to question and answer No. 6 involve the identical propositions heretofore discussed under subdivision 2, and need not be again referred to, save as they may be discussed under specification No. 4 upon the ground that plaintiff in his entire case failed to prove any duly authorized acceptance under the contract in behalf of the Company. The answer to question No. 12 was objected to for the reason that the same was not responsive to the question, in that the question simply required an estimate from the witness of the capacity of the concentrator, and

did not require that any reason for the estimate should be given. The answer, therefore, containing as it did what purported to be a reason for the giving of the estimate required by the question was not responsive to it, and to this extent should have been stricken out upon the objection of defendant. The irresponsive portion of the answer presented matter material in the question of defendant's counter claim for damages by reason of failure to complete the concentrator within the time provided, and could not have been anticipated from the question itself so as to have been met by defendant by cross-interrogatories, or to have become the subject of cross-examinations. In this, therefore, we submit, the Court likewise erred, and that this error was manifestly prejudicial to the defendant and appellant.

#3

third

The ~~fourth~~ specification consists of the action of the Court in overruling defendant's motion for a non-suit. The motion presents two propositions (see trascript, p. 25), the first of which, viz: That plaintiff had failed to establish a cause of action, in that by the contract proven it was provided that the sums should be payable and due a certain period after the acceptance of the mill, and that no acceptance by defendant or any person legally authorized to accept for defendant was proven, presents the question of the acceptance by Hesse and proof of his agency in a new light, i. e. granting that it were not necesseary under our practice that the agency should be established prior to the admission of the acts or declarations of the agent; or that, as is sometimes held under the common law decisions, the subsequent proof of agency cures the injury, was there here established by the plaintiff's case in chief any au-

thority upon the part of Hesse to bind the company by an acceptance, so as to enable them upon Hesse's acceptance to maintain an action under the contracts. The contract itself undertakes to define the extent of the powers conferred upon Hesse with relation to it, and clearly precludes the possibility of the possession of this power by him. He is expressly given the power to accept the designs to be submitted by Malter, but it is therein expressly provided that the mill shall upon completion be accepted by the party of the second part. (See transcript, p. 8, lines 1–7; p. 9, lines 14–18.) The testimony of G. B. Malter is simply to the effect that Hesse accepted the mill, (p. 15 lines 15–17) and that Child told him that he must make the mill acceptable to Hesse. This latter testimony was objected to, it being but the mere declaration of an agent in whom no power of delegating authority had been shown, and it not appearing that the declaration was made by the agent during the course of his employment. Hesse himself specifically testifies that he did not think it necessary to obtain any authority to accept the mill, and therefore that he obtained none, (p. 22, lines 7–24) and that he simply showed his letter of acceptance to H. W. Child. This, coupled with the further testimony of Malter, likewise objected to and introduced under objection found on page 15, lines 14 to 17, constitute the only testimony in chief referring in any manner to the Hesse acceptance. The only acceptance made was of the amendments to the contract, which was made by Lilienthal, and no authority in Child to delegate any of his powers was proven or sought to be proven. And the evidence conclusively shows that Hesse had absolutely no authority to accept the mill under the contract; that his act was unauthorized and not binding upon the company. Aside from the fact that the plaintiff's right of action depended upon an acceptance by appellant, the in-

structions of the Court show that an acceptance by appellant would preclude a claim for damages on account of delay and forbid the interposition of the counter-claim pleaded.

Chicago R. R. Co. vs. La., 60 Ills. 501.
Anderson vs. Rome R. R. Co., 54 N. Y. 334.
Stiles vs. Western R. R. 8 Mich. 64.
Doe vs. Robiinson, 24 Mo. 668.
Mundhenk vs. Ceute. Iowa R. R. Co., 57 Iowa 718.
Myer vs. Virg. and Truck R. R. Co., 16 Nev. 341.
Green vs. Ophir C. S. & G. M. Co., 45 Cal. 552.

IV.

The ~~fifth~~ fourth specification of error relates to the materiality of a certain question put by appellant, but excluded by the Court, and found upon p. 27, lines 27–29. This question was manifestly material and its exclusion error. The record discloses that the mill was not completed within the time provided by the contract. Plaintiff had introduced evidence to show that the delay was occasioned through fault of appellant by failure to have the lumber upon the ground in accordance with the terms of the contract. The Court instructed the jury that if it were established that the defendant failed to provide lumber in time, this would entitle the plaintiff to a resonable time in which to fulfill the contract, and this question tended directly to show the unreasonable character of the delay, in that it would have tended to show that the machinery was not ready at the time of the completion of the mlll building, and therefore that the delay was not due to the failure to have the lumber upon the ground at the time.

VI.

The sixth specification relates to the offer to prove as a measure of damage the actual daily expense and outlay of defendant in his business, which offer is found upon page 38 of the transcript. Proof of whatever approximate damage was sustained by appellant by reason of the failure of plaintiff to comply with the contract within a reasonable time was clearly admissible in support of the counter claim set forth in defendant's answer. The offer discloses the fact that appellant was engaged in no other business than in the reduction of ores, had no other mill or machinery for reducing the same than the one to be constructed; that all its expenses were incurred in said business, and that this mill and machinery had been relied upon; by reason of the failure to obtain the same for use they were put to a large daily expense. We submit that in the light of the authorities this was an approximate damage, and that the exclusion of this testimony as offered constitutes error.

V# AND VI#

Specifications ~~seven~~ five and ~~eight~~ six relate to the exclusion of certain letters found upon pages 28, 29, 30, 31, 32 and 33 of the transcript. The Hesse letters, each and all, tended to contradict the testimony of Hesse himself, as appears from the deposition, particularly the answer to interrogatory 10, and were also admissable as original evidence, for the reason that by the contract, as to the designs, Hesse was made the agent of *both* parties and his declarations were admissable against either.

~~IX AND X.~~ 7

seven

Specification ~~nine and ten~~ relates to the ~~giving and~~ refusal of certain instructions; and the former has been already considered under sub-division four. We submit that the instructions presented by appellant and refused by the Court, and found upon p. 40, lines 25 to 29 of the transcript, correctly stated the law, and that its refusal was error by the Court Time was clearly the essence of this contract, because expressly therefor stipulated: and if, therefore, the failure to comply with the provisions of the contract as to time was without the fault of the company, then plaintiff would be compelled to resort to a *quantam meruit*, and could not recover upon the contract.

7th Amer. Dec., 492, and 10th Cal. 327, *et seq.*

And in this instance, as the question relates to the refusal to give an instruction the question of injury is immaterial, for its effect on the jury cannot be determined.

Buseinne vs. Coffe, 14 Cal. 91.

Respectfully submitted

TOOLE & WALLACE,

Attorneys for Appellant Gregory Con. Mng. Co.

Edwin W. Toole

Wm Wallace Jr.

United States Supreme Court.

OCTOBER TERM, 1891.

THE GREGORY CONSOLIDATED MINING COMPANY AND HENRY E. KAVANAUGH, PLAINTIFFS IN ERROR,

vs.

LEWIS M. STARR, DEFENDANT IN ERROR.

No. 356.

BRIEF FOR DEFENDANT IN ERROR.

This action was brought to recover the last two ten thousand dollar installments alleged to be due the defendant in error on a contract made by the defendant in error and one Malter, partners doing business under the firm name of the "Ætna Iron Works," with the plaintiffs in error, whereby said "Ætna Iron Works" agreed to build and equip a concentrating quartz mill for the said plaintiffs in error for fifty thousand dollars; twenty thousand dollars to be paid on shipment of machinery therefor from San Francisco, and the balance in three ten thousand dollar installments, to become due respectively in thirty, sixty, and ninety days from the acceptance of said mill on completion by the plaintiffs in error. The first payment of

twenty thousand dollars on shipment of the machinery was made, the first ten thousand dollar installment, to be paid thirty days after acceptance, on completion of the mill, is involved in the case following this, being number 357.

Malter assigned his interest to the defendant in error, who brought this suit to recover the installments due in sixty and ninety days, respectively, and also to foreclose a mechanics' lien upon the property permitted by a law of the Territory of Montana. The complaint states the cause of action adequately, and there is no assignment of error as to its insufficiency, nor as to any variance between the pleadings and the proof.

The answer by inference, argument, and evasion perhaps sufficiently denies—

1st. Making the contract set out in the complaint with defendant in error and his copartner, but says it made a contract "entirely different" with "The Ætna Iron Works."

2d. Avers that by its contract with the "Ætna Iron Works" said "Ætna Iron Works" agreed to construct said mill, and have the same completed, and in perfect running order, and delivered within four months from the date of said contract "upon certain other terms and conditions in said contract mentioned" (not alleged), but did not complete or deliver said mill, nor was it in running order for delivery at said date, which was one of the terms and conditions attached to and included in said contract, by reason whereof no recovery could be had on the contract; that, by the terms of the contract, the plaintiff (defendant in error) and his copartner, if said copartnership exists, obligated and bound themselves to have the mill completed and in perfect running order by the 28th of November, 1883, but neglected and failed so to do, and did not offer to deliver or tender the same until about February 10, 1884.

3d. By way of counter-claim avers that the reasonable value of the use of the mill was one hundred dollars per day, and defendant by reason thereof has been damaged seven thousand three hundred dollars; that plaintiff (defendant in error) and his partner failed to complete the "concentrator" according to the terms of the contract, and defendant will have to expend in completing the same fifteen hundred dollars, which is the reasonable value therefor; that the crushing machinery was not completed according to said contract, by reason whereof said defendant was delayed and lost time in and about changing the same in the sum of one thousand dollars, making nine thousand eight hundred dollars, which it asks may be adjudged as a counter-claim.

This is the material substance of the answer.

The reply says that the Ætna Iron Works did agree conditionally to complete the mill in four months from date of contract, the condition being that the lumber to be used thereon should be delivered within forty days after the receipt of the bill of lumber by H. W. Child, but said lumber was not delivered within said forty days, which greatly hindered construction, but it was constructed within a reasonable time, and it denies in detail the counter-claim. There was an amendment to the answer alleging a set off and a denial of the same by replication, which was not mentioned on the trial. Nothing is omitted in the reply necessary to put in issue every allegation of the answer.

I.

The first error assigned is the refusal of the Court to suppress the deposition of Charles Hesse. On page 11 of the Record there is a copy of the motion of the plaintiffs in error to suppress this deposition for alleged reasons,

but there is nowhere in the Record a statement that any one of the reasons given in the motion for the suppression of the deposition was in fact true. No copy of the notice to take said deposition, or of the certificate thereto, or of the affidavit is in the Record to show that the refusal to suppress was an error. It complains of action, the ground for which it has not preserved by a bill of exceptions or otherwise.

II.

The second assignment of error is the overruling defendant's objections to questions 6, 9, and 12, and answers to questions 6, 7, 8, 9, 12, and uncertain and undesignated portions of the answer to question 15, as also to the reading of Hesse's letter of acceptance in the deposition of George H. Malter. The written contract provided the mill was to be completed within four months, provided the lumber therefor was delivered within forty days after the receipt of the bill therefor by H. W. Child, representing plaintiffs in error, and the 6th question was competent to show when he received that bill of lumber. The ninth question touched only the date of completion and acceptance of the mill, and was unobjectionable in form. The objection to the 12th question can be of no consequence, for the witness did not answer it, mistakenly supposing he had answered it in his reply to interrogatory ten. The objection to the 6th answer stands on the proposition laid down when the deposition was sought to be read, that while the question as to when Child received the bill of the lumber might be a material question, the contract did not expressly say Malter was the party to hand it to him. It is not seen that there is force in this. The answer to the 7th interrogatory, so far as it was responsive to the

question or material, stated in effect that the lumber for the erection of the mill was received on the ground from the 17th of August to the 8th of October, 1883, which was proper to be proven.

The answer to the 8th interrogatory involving many items was, in effect, that the witness did not have the copy of the bills asked for, but it was not what was in the bills that was the contention but when the lumber was delivered.

The answer to the ninth interrogatory was to material questions involved, and in form was exact, disclosing no objectionable features whatever. What cross-examination would develop was another question, but the Court could not anticipate incompetent evidence in the answer. Nor can any objection be found to the answer to the 12th interrogatory in law. The witness supposed he had once given the desired information and he mistakenly declined to answer it on that false supposition.

We cannot go to Montana and see what parts of the answer to question 15 are objected to, but it was all competent in view of the defence sought to be made, as it became to some extent a question whether the mill was completed within a reasonable time and which party caused delay. There was indeed no allegation that the completion of the mill had been unreasonably delayed; the complaint was that it had been delayed beyond the four months which the plaintiff in error rigorously insisted was, without conditions, the contract time. The evidence shows that Hesse was the superintendent of the plaintiffs in error; that he determined where the mill was to be built; that he made the plans therefor; that he changed them from time to time, both before and after the contract was made; that he supervised its construction by consent and direction of the president and the assistant

general manager; that the contractors were told to please him, and that when it was acceptable to him it would be to the company.

Some powers are implied in an agent or officer by reason of having the agency or office; some powers are implied from the duties which the agent habitually is permitted to perform; some powers are implied because that power in the agent or officer has been asserted, by the corporation having confirmed repeated similar acts or acts of such wider import or authority as to include the lesser authority involved, and power in a given agent or officer will be held to exist by the conduct of business in a given jurisdiction or sovereignty continuously without other and superior officers or agents therein. Within every sovereignty where business is locally conducted there must be authority reposed adequate to the conduct of such business. The kind of proof to establish agency or authority is not defined in law, its weight is not material, its tendency is the test, and when proof, however slight, is introduced, it, with the acts of the agent, must be left to the jury. In this case the court told the jury that the plaintiffs in error could only be affected by Hesse's acts after he was proven to have been its agent therefor. The Court, when it comprehends the proposition of law sought to be maintained by the fourteen authorities cited by plaintiff in error that a court has no right to control the order of proof, will not be surprised to learn that no one of the fourteen authorities cited supports that contention. As to authorities, see those cited in brief of defendant in error in next case, No. 357, in this Court.

On the main contention of plaintiff in error that the Ætna Iron Works unconditionally agreed to complete the mill in four months, it failed. There was no contradiction

in the proof that a condition precedent was that Mr. H. W. Child, "representing the company," as it is said in the contract, to wit, the plaintiffs in error was to have the lumber on the ground within forty days from the date of receiving the bill therefor at a certain price named, and that the lumber was not on the ground within about seventy days. Of course, this being a specific provision of the contract, it made no difference who Mr. Child represented, but it was his theory that he in that respect represented the Ætna Iron Works, and that if the delivery of the lumber was delayed beyond forty days the contract was thereby changed, and became another contract to build within four months, whether the lumber was delivered as provided or not. This appears from his evidence. The plaintiff in error did not prove a violation of the contract in respect of the time of completion of the mill, and did not propose to do so, and in fact the changeless facts of the case showed it could not do so; but it wanted, nevertheless, to prove "the daily expense incurred by it while said mill stopped running." This was not competent under any circumstances.

It did not allege in its counter-claim payment of any expenses as part of its damage; it did not propose to confine its evidence to "necessary" expenses incurred by it because the mill was idle; it asked no question of a witness with a view to bring out this proof, to which the defendant in error could, or did object, but abstractly it proposed to show that it was paying out some sum for fuel, and all other things in connection with its reduction works, without reference to whether such payment was or was not necessary, or was of no avail because of the mill being idle, and this it proposed to prove as part of its damage, when it had not proven and did not propose to prove a breach of the contract. Such damages were remote and consequential if the breach of contract had been proven.

The plaintiff in error complains also that its letter to the Ætna Iron Works urging haste was excluded. On what principle of law it was admissible we are not advised. If a party may thus manufacture evidence litigants will hereafter be kept busy. The admissibility of this letter must stand on a like proposition of law as the admissibility of the other four letters from Hesse to Child. That proposition is that the liability of one party may be proven by the declarations each to the other of the agents of the other party. Unless this is an offensive form of hearsay, definitions fail. Nor was there error in any instruction given or in the one refused. In every respect the proceedings conformed to law, the subterfuges to evade this payment failed, but as a method of delay they have been a resplendent success.

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